No. 06-1505
Title: Clifford B. Meacham, et al., Petitioners
v.
Knolls Atomic Power Laboratory, aka KAPL, Inc., et al.
Docketed: May 15, 2007
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (02-7378, 02-7474)
Decision Date: August 14, 2006
Rehearing Denied: January 8, 2007
Questions Presented

| ~~~Date~~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

Mar 5 2008	Record received from the U.S.C.A. for the Second Circuit. (1 box)
Mar 11 2008	Brief amicus curiae of United States filed.
Mar 11 2008	Brief amici curiae of AARP, et al. filed.
Mar 28 2008	CIRCULATED.
Mar 31 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 4 2008	Brief of respondents Knolls Atomic Power Laboratory, aka KAPL, Inc., et al. filed. (Distributed)
Apr 11 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Breyer took no part in the consideration or decision of this motion.
Apr 11 2008	Brief amicus curiae of Employment and Labor Law Committee of the Association of Corporate Counsel filed. (Distributed)
Apr 11 2008	Brief amicus curiae of General Electric Co. filed. (Distributed)
Apr 11 2008	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Apr 11 2008	Brief amicus curiae of National School Boards Association filed. (Distributed)
Apr 11 2008	Brief amici curiae of Equal Employment Advisory Council, et al. filed. (Distributed)
Apr 14 2008	Reply of petitioners Clifford B. Meacham, et al. filed. (Distributed)
Apr 21 2008	Letter received from counsel for the petitioners. (Distributed).
Apr 23 2008	Argued. For petitioners: Kevin K. Russell, Washington, D.C.; and Daryl Joseffer, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Seth P. Waxman, Washington, D.C.

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No. 06-___

IN THE

Supreme Court of the United States

Clifford B. Meacham *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Age Discrimination in Employment Act (ADEA) prohibits employment practices that have an unjustified disparate impact on older workers, *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), but also provides that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The questions presented are:

1. Whether an employee alleging disparate impact under the ADEA bears the burden of persuasion on the "reasonable factors other than age" defense, as held by the Second Circuit in this case in conflict with the decisions of other circuits and a regulation of the Equal Employment Opportunity Commission.

2. Whether respondents' practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a "reasonable factor other than age" as a matter of law.

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in this case include Raymond Adams, Wallace Arnold, Deborah Bush, William Cabot, Allen Cromer, Thedrick Eighmie, Belinda Gundersen (as appointed representative of her late husband, Paul Gundersen), Clifford Levendusky, Clifford Meacham, Bruce Palmatier, Neil Pareen, James Quinn, Margaret Reynheer (as appointed representative of her late husband, William Reynheer), John Stannard, Allen Sweet, David Townsend, and Carl Woodman.

The defendants include Knolls Atomic Power Laboratory, Lockheed Martin Corp., and John J. Freeh.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Clifford B. Meacham *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-32a) is published at 461 F.3d 134. A prior decision of the court of appeals (Pet. App. 33a-69a) is published at 381 F.3d 61. The magistrate judge's order denying respondents' motion for judgment as a matter of law (Pet. App. 70a-154a) is published at 185 F. Supp. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2006. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on January 8, 2007. Pet. App. 155a-56a. On April 3, 2007, Justice Ginsberg extended the time in which to file this petition to and including May 9, 2007. App. No. 06A946. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The relevant provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 623, are reproduced in the appendix to this petition. Pet. App. 157a-58a.

STATEMENT

Petitioners, all workers above the age of forty, were terminated off during a reduction in force in which the employer delegated broad discretionary authority to supervisors to determine which employees should be fired. A jury found that respondents' failure to adequately monitor and direct that discretionary process had an unlawful disparate

impact on older workers, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. The Second Circuit affirmed the jury verdict in an initial appeal, but that judgment was vacated and remanded by this Court for reconsideration in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005). On remand, the court of appeals held, in conflict with the decisions of other circuits and with a regulation issued by the Equal Employment Opportunity Commission (EEOC), that petitioners bore the burden of demonstrating that respondents' employment practices were unreasonable. The court further held, in conflict with the position of the EEOC and this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), that the delegation of broad termination discretion to company supervisors usually would be, and in this case was, reasonable and therefore immune from disparate impact challenge. Both holdings require review and correction by this Court.

1. The ADEA provides that it "shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).[1] The statute further provides that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsectio[n] (a) . . . where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1). The EEOC, which has rulemaking and enforcement authority under the statute,[2] has provided by

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[1] The Act is limited to discrimination against "individuals who are at least 40 years of age." *Id.* § 631(a).

[2] *See* 29 U.S.C. § 628 (providing that "the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this

regulation that "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. § 1625.7(e).

The prohibitory language of Section 623 of the ADEA parallels the prohibition in Title VII of the Civil Rights Act against employment discrimination on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a). This Court has accordingly looked to its cases interpreting Title VII in construing the ADEA's prohibition against age discrimination. *See, e.g.*, *Smith*, 544 U.S. at 233-34. One of the Title VII precedents of "compelling importance" to the interpretation of the ADEA is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Smith*, 544 U.S. at 234. In *Griggs*, this Court interpreted the common language of Title VII and the ADEA to prohibit intentionally discriminatory employment practices as well as practices that have an unjustified disparate impact on protected employees. 401 U.S. at 429-30. The Court later held that *Griggs*'s disparate impact analysis applies not only to employment tests and criteria, like those at issue in *Griggs* itself, but also to an employer's "system of subjective decisionmaking," *Watson*, 487 U.S. at 990, like the one challenged in this case.

In subsequent decisions, including *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), this Court provided a framework for considering disparate impact claims under Title VII. First, the "plaintiff must begin by identifying the specific employment practice that is challenged" and show that the "challenged practice has a significantly disparate impact on employment opportunities" for protected workers. *Id.* at 656. If that burden is satisfied, "the case will shift to any business justification [the employer] offers for [its] use of

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chapter"); *id.* § 626(a)-(b) (providing EEOC enforcement authority with respect to private employment); *id.* § 633a(b) (same for federal employment).

these practices." *Id.* at 658. This so-called "business necessity test" contains two components: "first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact." *Id.* With respect to the business justification, "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. On this question, "employer carries the burden of producing evidence of a business justification for his employment practice" but the "burden of persuasion . . . remains with the disparate-impact plaintiff." *Id.* If the employer produces evidence of a business justification, and the employee fails to rebut it, the employee may yet prevail by identifying "alternatives to [the employer's] hiring practices that reduce the racially disparate impact of practices currently being used" and would be "equally effective . . . in achieving [the employer's] legitimate employment goals." *Id.* at 660-61.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that the ADEA, like Title VII, prohibits employment practices that have an unjustified disparate impact on protected workers. *Id.* at 240. The Court further concluded that "*Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." *Id.*[3] However, the Court also held that "the scope of disparate-impact liability under ADEA is narrower than under Title VII," because the ADEA (but not Title VII) contains an exception for disparities resulting from "reasonable factors other than age." *Id.* This "RFOA" provision, the Court held, precludes liability for employment practices that would otherwise be unlawful under *Wards Cove*, if the practice is

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[3] In 1991, Congress amended Title VII, but not the ADEA, to alter the burden-shifting regime established in *Wards Cove*. *See Smith*, 544 U.S. at 240 (discussing Civil Rights Act of 1991, § 2, 105 Stat. 1071).

"reasonable." 544 U.S. at 241. Without addressing which party bears the burden of proving or disproving the "reasonableness" of the employer's practice, the Court concluded that the practice before it – giving larger percentage pay raises to less senior employees in order to bring "starting salaries . . . up to the regional average," *id.* at 231 – was "unquestionably reasonable," *id.* at 242.

2. Petitioners are former employees of respondent Knolls Atomic Power Laboratories who lost their jobs during an involuntary reduction in force. Pet. App. 4a. Petitioners claimed, among other things, that respondents violated the ADEA by designing and implementing the workforce reduction process in a manner that had an unlawful disparate impact against older workers protected by the ADEA. *Id.* at 7a. In particular, the Lab decided which employees to terminate by instructing certain unit managers to rank their employees "between zero and ten for performance, flexibility, and criticality of their skills; and giving up to ten points for company service." Pet. App. 5a. This system gave substantial discretion to individual supervisors to determine whom to terminate,[4] and led to "startlingly skewed results." Pet. App. 7a. Of the thirty-one individuals selected for layoff, all but one were over forty. At trial, petitioners' statistical expert testified that "the probability of this differential occurring by chance was approximately one in 348,000." *Id.*

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[4] The guidance given supervisors on how to judge an employee's "flexibility" and "criticality" did little to constrain that discretion. Supervisors were told that the "tests for making a flexibility determination were whether the employee's 'documented skills [could] be used in other assignments that [would] add value to current or future Lab work." Pet. App. 5a-6a. "Critical skills were those skills that were critical to continuing work in the Lab as a whole," taking into account whether the skill was "a *key* technical resource" and whether it was available elsewhere within the Lab or in the external labor market. *Id.* at 6a (emphasis in original).

at 42a.[5] Petitioners' expert further found that the disparate effect on age arose principally from the ill-defined criteria of "criticality and flexibility" that relied on the subjective impressions of individual managers and, hence, were potential vehicles through which supervisors could give effect to overt or subconscious bias against older workers. *Id.*

The expert also testified that "the procedures set up for review of the individual managers' decisions 'did not offer adequate protections to keep the prejudices of managers from influencing the outcome.'" *Id.* For example, although the written policy required the Lab's management to conduct a disparate impact analysis to guard against age discrimination, the actual analysis conducted simply compared the average age of the Lab's more than 2000 employees before and after the reduction in force; unsurprisingly, the average changed little as the result of terminating less than two percent of its workforce. *Id.* at 43a.

3. Petitioners sued respondents claiming, among other things, that their "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility" had an unlawful disparate impact based on age in violation of the ADEA. Pet. App. 7a. The parties consented to have the jury trial conducted before a magistrate. After hearing extensive testimony and evidence, the jury found that petitioners had established all the elements of an ADEA disparate impact claim under the law of the Second Circuit at the time. *Id.* at 45a. In particular, the jury found that plaintiffs had "proven that a specific employment practice of the defendants . . . although non-discriminatory on its face, had an adverse impact on the plaintiffs because of their ages"; that defendants failed to "articulate[] a business justification for

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[5] The odds varied depending on the comparison drawn, the highest reflecting the chance of drawing thirty workers older than forty off the lists of workers chosen for consideration for layoff, which was "approximately one in seventy-three," a still-statistically significant correlation. *Id.*

selecting the plaintiffs for termination"; that plaintiffs had proven "that an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals as the method actually followed by the defendants" and that defendants acted willfully. *Id.* The magistrate judge denied respondents' motions for judgment as a matter of law, *id.* at 72a., and the Second Circuit affirmed, *id.* at 36a.

4. Shortly thereafter, this Court issued its decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), agreeing with the Second Circuit that a disparate impact cause of action exists under the ADEA but making clear that an employer is not liable for a disparate impact that is the result of a reasonable factor other than age. Subsequently, this Court granted respondents' petition for certiorari, vacated the Second Circuit's judgment, and remanded for reconsideration in light of *Smith*. 544 U.S. 957 (2005).

On remand, the EEOC filed an amicus brief in support of petitioners, arguing that under *Smith*, the employer bears the burden of proof on the RFOA defense. *See* EEOC C.A. Br. 14. More specifically, the Commission argued that the employer must "prove that the challenged employment practice was reasonably designed to further or achieve an important and legitimate business purpose and was administered in a way that reasonably advances that purpose." *Id.* at 18. A divided panel rejected that view and reversed the denial of respondents' motion for judgment as a matter of law. The majority concluded that *Smith* cast no doubt on petitioners' showing that respondents' layoff practices caused "startlingly skewed results" having a marked disparate impact on the basis of age. Pet. App. 7a. The majority concluded, however, that under *Smith*, it was no longer sufficient for petitioners to show that an alternative practice could have avoided the disparate impact, as had been the rule in the Second Circuit prior to *Smith*. *Id.* at 9a. Instead, the court held, "the appropriate test is 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment practice, in relying on specific non-

age factors, constitutes a reasonable means to the employer's legitimate goals." *Id.*

The question then became whether the jury verdict could be sustained under that standard. To resolve that question, the court was required to determine "who bears the burden of persuasion with respect to the 'reasonableness' of the employer's proffered business justification under the ADEA disparate-impact framework." *Id.* at 11a. Agreeing with the Tenth Circuit, and disagreeing with the EEOC, the court held that burden belongs to the plaintiff. *See id.* (citing *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006)). The majority acknowledged that there "is some force" to the arguments to the contrary, including that the RFOA provision "(i) permits conduct that is 'otherwise prohibited' – language that suggests an affirmative defense; and (ii) is listed in the statute after the bona fide occupational qualification ('BFOQ') exception – an affirmative defense for which the Supreme Court has strongly suggested the employer bears the burden of persuasion." *Id.* at 13a (citations omitted). The majority nonetheless concluded that the employee should bear the burden of disproving reasonableness, because is it "hard to see how an ADEA plaintiff can expect to prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable." *Id.* at 14a.

The court then proceeded to decide whether the evidence produced at trial was sufficient to satisfy petitioners' burden. *Id.* at 16a-19a. The court acknowledged that the system of discretionary decisionmaking chosen by respondents risked, and indeed produced, a massive reduction in employment opportunities for older workers. *Id.* at 17a. It held, however, that this fact had no bearing on the reasonableness of the system. *Id.* at 18a-19a. The Court likewise recognized that "the process could have been better scrutinized to guard against a skewed layoff distribution." *Id.* at 19a. But the court nonetheless held as a matter of law that employment

practices based on discretionary decisionmaking are generally immune from challenge under the ADEA:

> Any system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable.

Id.

Judge Pooler dissented. Disagreeing with the majority's analysis, she would have held that the RFOA creates a traditional affirmative defense upon which the defendant bears the burden of persuasion. *Id.* at 25a-31a. She explained that Section 623(f) carved out an exception to liability – providing a safe haven for conduct "otherwise prohibited" by the Act – as is common with other affirmative defenses upon which the defendant bears the burden of proof. Pet. App. 26a-27a. She also noted that Congress had expressly included the "otherwise prohibited" language in a parallel provision (Section 623(f)(2)) to overturn this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), which had construed that provision not to create an affirmative defense. Pet. App. 27a-28a. Judge Pooler further observed that "several circuits have characterized the RFOA provision and other Section 623(f) exemptions as affirmative defenses." *Id.* at 29a (collecting cases).

The Second Circuit denied petitioners' subsequent petition for rehearing and rehearing en banc. *Id.* at 155a-56a. This petition followed.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case deepened a division of authority over an important question that frequently arises under the ADEA, and which this Court previously granted certiorari to decide but did not resolve. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408 n.10 (1985). In holding that employees bear the burden of disproving the asserted reasonableness of an employer's discriminatory practices in an ADEA disparate impact case, the Second Circuit's decision is in accord with the law of the Tenth Circuit, but in conflict with decisions from the Sixth and Ninth Circuits. At the same time, the court of appeals' decision rejected the interpretation given the Act by the agency Congress tasked with administering the statute, as expressed through notice-and-comment rulemaking. The Second Circuit's declaration that reliance upon subjective decisionmaking by direct supervisors will ordinarily be reasonable – and therefore beyond disparate impact challenge under the ADEA – also conflicts with this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), which held that such a "system of subjective decisionmaking" *is* subject to challenge under a disparate impact regime. Certiorari should be granted to resolve these conflicts.

I. This Court Should Resolve The Growing Division Among The Courts Of Appeals Over Who Bears The Burden Of Persuasion On The "Reasonable Factors Other Than Age" Defense.

Whether employers or employees bear the burden of proof under the ADEA's "reasonable factors other than age" defense is the subject of a substantial, mature circuit split awaiting resolution by this Court. The question is all the more urgent because two circuits now apply a standard contrary to that applied by the EEOC in the course of its administrative responsibilities under the Act. Granting certiorari in this case would remove that untenable conflict

while also providing this Court an opportunity to bring much needed clarity to the level of deference owed the EEOC's ADEA regulations.

A. The Decision Below Deepened A Circuit Split On The Burden Of Proof Under The RFOA Provision.

The decision in this case exacerbated a long-standing division of authority this Court attempted, but failed, to resolve in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). *See id.* at 408 n.10. This petition provides the Court an opportunity to finish the work it began in that case.

In *Western Airlines*, commercial pilots brought a disparate impact challenge to their employer's policy of forbidding pilots from "downbidding" for the position of second officer, alleging that it had a disparate impact on the basis of age. *See Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384, 391 (C.D. Cal. 1981).[6] The pilots prevailed at trial and the airline appealed, arguing that "that the district court erred in instructing the jury that the defendant had the burden of proving 'by a preponderance of the evidence' that its decision . . . was motivated by 'reasonable factors other than age.'" *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983). The Ninth Circuit rejected that assertion, explaining that the employer

> confuses the elements of and burdens borne in the case-in-chief and those of an affirmative defense. The "reasonable factors" defense appears alongside the BFOQ exception in the ADEA, 29 U.S.C. § 623(f), and is an affirmative defense for which the employer bears the burden of proof.

Id. For this conclusion, the Ninth Circuit cited the EEOC's regulation at 29 C.F.R. § 1625.7(e), which provides that "the

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[6] The plaintiffs also challenged the airline's mandatory retirement age for pilots. 514 F. Supp. at 391.

employer bears the burden of showing that the 'reasonable factor other than age' exists factually.'" 709 F.2d at 553. The court further relied on a prior regulation of the Department of Labor that likewise provided that the RFOA provision "must be construed narrowly, and the burden of proof . . . will rest on the employer." *Id.* (citing 29 C.F.R. § 860.103(e) (1982)).[7] This Court granted certiorari to decide the burden of proof question, but ultimately failed to reach it. *See* 472 U.S. at 408 n.10.

In *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975), the Sixth Circuit expressed the same understanding of the Department of Labor regulation as the Ninth Circuit, explaining that the provision was directed at shifting the burden of persuasion to the employer in a disparate impact case. *Id.* at 315.[8] *See also Cova v. Coca-Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 959-60 (8th Cir. 1978) (stating that the employer bears the burden of the proof on the RFOA defense in a disparate treatment case).[9]

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[7] As originally enacted, the ADEA authorized the Secretary of Labor to issue implementing regulations. *See* Pub. L. No. 90-202 § 9, 81 Stat. 605 (1967). Pursuant to Reorganization Plan No. 1 of 1978, Congress transferred enforcement authority over the ADEA from the Department of Labor to the EEOC effective July 1, 1979. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. Section 321, *reprinted in* 92 Stat. 3781 (1978).

[8] While the statement was dicta, there is no basis to believe that the courts of the Sixth Circuit would not follow this understanding when confronted by the question presented in this case.

[9] As Judge Pooler noted below, a number of courts have characterized the RFOA provision as embodying an "affirmative defense." *See* Pet. App. 29a (citing, *e.g.*, *Erie Country Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193, 199 (3d Cir. 2000); *Baker v. Delta Airlines, Inc.*, 6 F.3d 632, 639 (9th Cir. 1993); *Cova v. Coca-Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 959-60 (8th Cir. 1978)). *See also Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 808 (9th Cir. 2004).

Other courts, however, have held that the plaintiff bears the burden of disproving the reasonableness of the employer's practice under the RFOA provision. In this case, while acknowledging that there was "some force" to the contrary view, the Second Circuit concluded that "the best reading" of the ADEA is that "the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable." Pet. App. 11a. The court specifically embraced the Tenth Circuit's decision in *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186 (10th Cir. 2006). *See* Pet. App. 11a. In *Pippin*, the Tenth Circuit held that

> after an employee establishes a prima facie case of disparate impact age discrimination under the ADEA, the burden of production shifts to the employer to assert that its neutral policy is based on a *reasonable* factor other than age. .... [T]o prevail on an ADEA disparate impact claim, an employee must ultimately persuade the factfinder that the employer's asserted basis for the neutral policy is *unreasonable*.

440 F.3d at 1200 (emphasis in original).

Two other circuits have said that the employee bears the burden of proof on the RFOA defense in cases involving disparate treatment, but have not considered whether that holding applies to disparate impact cases. *See Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1416 (11th Cir 1986) ("We have repeatedly held that the plaintiff bears the burden of persuasion on the RFOA defense."); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-91 (5th Cir. 1978) (holding that RFOA provision is not an affirmative defense).

B. Allocation Of The Burden of Proof On The RFOA Defense Is A Question Of Recurring Importance In ADEA Litigation.

This division of authority should be resolved by this Court in light of the recurring importance of the issue.

Congress enacted the ADEA because it found that older workers were routinely subject to an array of overt and subtle discrimination, including the "discriminatory effects result[ing] from '[i]nstitutional arrangements that indirectly restrict the employment of older workers." *Smith*, 544 U.S. at 232 (citation omitted). As a result, ADEA disputes, including disparate impact claims, are common,[10] particularly in cases such as this, involving involuntary reductions in force.[11] *See, e.g.*, Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v. City of Jackson *Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 ALBANY L. REV. 143 (2006).

Very often the burden of proof on the RFOA defense is outcome-determinative. By its nature, the "reasonableness" standard cannot be applied with mathematical precision. And in many cases, like this one, an employer may be able to articulate a weak justification for employing a practice with a marked discriminatory effect. Whether that explanation is sufficient to avoid liability will often depend, as in this case,

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[10] The EEOC does not publish statistics that distinguish between disparate treatment and disparate impact claims under the ADEA, but its data does show that the agency has received more than 90,000 charges of age discrimination over the past five years for which data is available. *See* Age Discrimination in Employment Act (ADEA) Charges, FY 1997-FY2006 (available at *http://www.eeoc.gov/stats/adea.html*).

[11] *See, e.g., Reminder v. Roadway Express, Inc.*, No. 06-3224, 2007 WL 414273 (6th Cir. 2007) (disparate impact claim to reduction in force); *Pippin*, 440 F.3d at 1189 (same); *Smith v. Allstate Ins. Co.*, 195 Fed. Appx. 389 (6th Cir. 2006) (same); *Seasonwein v. First Montauk Sec. Corp.*, 189 Fed. Appx. 106 (3d Cir. 2006) (same); *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603 (9th Cir. 2005) (same); *Keating v. Harsco Corp.*, 109 Fed. Appx. 835 (8th Cir. 2004) (same); *Pottenger v. Potlatch Corp.*, 329 F.3d 740 (9th Cir. 2003) (same); *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948 (8th Cir. 2001).

on who bears the burden of persuasion on the question of reasonableness. *See* Pet. App. 16a-19a.

Accordingly, the current circuit split risks treating similarly situated workers and employers differently depending on accidents of geography, a disparity inconsistent with Congress's intent to create a uniform national law regarding age discrimination in employment. Only this Court can restore that intended uniformity to the law.

C. The Conflict Between Two Courts Of Appeals And The EEOC Provides Additional Reason For Review By This Court.

The Second and Tenth Circuits' failure to defer to the EEOC's interpretation of the RFOA provision – expressed in a notice-and-comment regulation as well as an amicus brief to the Second Circuit in this case, see EEOC C.A. Br. 14 – is not only erroneous, *see infra*, but also creates an untenable conflict between the administrative and judicial enforcement of the statute in these circuits.

That conflict gives rise to two distinct problems. First, the conflict will predictably lead to different treatment of private and federal employees subject to the same employment practices. In 29 U.S.C. § 633a, Congress gave the EEOC responsibility for enforcing the proscriptions of the ADEA against federal employers, along with the authority to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." *Id.* § 633a(b). Pursuant to that authorization, the EEOC established an administrative process for adjudicating federal-sector ADEA complaints, generally culminating with review by the Commission. *See generally* 29 C.F.R. Part 1614; 29 C.F.R. § 1614.401-410. The resulting decision is binding upon the federal agency. *Id.* § 1614.502.

As a result, within the Second and Tenth Circuits, private and federal workers are subject to the opposite standards of proof in challenging the discriminatory impact of identical

employment practices. In EEOC administrative proceedings challenging federal practices, the burden of proving the RFOA defense falls upon the employer; in parallel private litigation in federal court, the burden falls on the employee. In many cases, that difference may result in the same practice being deemed illegal or not depending on whether the employer is a private corporation or a federal entity. Whether a particular reduction-in-force practice is held illegal under the ADEA should not depend on whether the lab is run directly by a federal agency or, instead, operated by a private entity on a government contract.

The disagreement between the EEOC and the circuits also gives rise to a second difficulty with practical consequences for the private sector. While the EEOC does not have direct adjudicative authority over private employers as it does over federal agencies, the Commission nonetheless has a substantial role in enforcing the ADEA against private employers. By statute, the EEOC is required to receive and evaluate private-sector ADEA complaints. *See* 29 U.S.C. § 626(d). If the Commission determines that the charge of discrimination is well-founded, it is authorized to commence conciliation and, if conciliation fails, litigation. *See* 29 U.S.C. § 626(b). In deciding whether a disparate impact claim is meritorious, and whether to commence litigation in response to that charge, the EEOC will apply its regulation placing the burden of proving the RFOA defense on the employer. If that regulation is invalid, employers may be unnecessarily subject to litigation based on an erroneous view of the law. On the other hand, if the Second and Tenth Circuits have erred in placing the burden on plaintiffs, workers in those circuits will be unduly hampered in vindicating their rights under this important statute.

Review is warranted not only to resolve the conflict over the meaning of the RFOA provision, but also to address a longstanding confusion regarding the degree of deference owed to the EEOC's ADEA regulations. That issue arose, but was not resolved, in *Smith*. In that case, the Fifth Circuit

declined to give *Chevron* deference to the EEOC's ADEA regulations on the ground that they were labeled as "interpretive" by the agency. *Smith v. City of Jackson*, 351 F.3d 183, 189 n.5 (5th Cir. 2003). Other circuits, however, have applied *Chevron* to the same "interpretative" regulations, regardless of their label. *See, e.g., Adams v. Florida Power Corp.*, 255 F.3d 1322, 1328 & n.4 (11th Cir.), cert. granted, 534 U.S. 1054 (2001), cert. dismissed, 535 U.S. 228 (2002); *Kralman v. Illinois Dep't of Vet. Affairs*, 23 F.3d 150, 155 (7th Cir. 1994); *see also General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (noting that the "parties contest the degree of weight owed to the EEOC's reading" of 29 C.F.R. § 1625.2(a), but not resolving the question). This Court did not resolve the conflict in *Smith*, *see* 544 U.S. at 239, although members of the Court expressed different views on the question. *Compare id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (giving *Chevron* deference to regulation) with *id.* at 263-65 (O'Connor, J., dissenting) (declining to give *Chevron* deference). This case provides the Court an opportunity to resolve that outstanding division and confusion.

D. Review Is Also Warranted Because The Decision Below Is Wrong.

The Second Circuit's decision is also wrong, ignoring an agency interpretation that is due deference and is consistent with the text, structure, history, and purposes of the Act.

1. The Text, Structure, History, And Purposes Of The ADEA Demonstrate That The RFOA Provision Creates An Affirmative Defense.

The RFOA provision is one of several affirmative defenses enumerated in subsection (f) of 29 U.S.C. § 623. That provision begins, "It shall not be unlawful for an employer" and is followed by three subsections. Two of the subsections continue with the phrase "take any action

otherwise prohibited" by the ADEA, making clear that the rest of the two subsections provide a defense to otherwise unlawful conduct. *See* 29 U.S.C. § 623(f)(1)-(2). As the Second Circuit acknowledged, this construction ordinarily is used to establish an affirmative defense. Pet. App. 13a. And, in fact, this Court has already recognized that at least one of the defenses established in subsection (f)(1) – the claim that "age is a bona fide occupational qualification" – constitutes an affirmative defense. *See Smith*, 544 U.S. at 233 n.3; *see also, e.g., Everson v. Michigan Dep't of Corr.*, 391 F.3d 737, 749 (6th Cir. 2004) (recognizing same of BFOQ defense under Title VII); *Healey v. Southwood Psych. Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996) (same), *Torres v. Wisconsin Dep't of Health & Soc. Servs.*, 838 F.2d 944, 949 (7th Cir. 1988) (same); *Air Line Pilots Ass'n v. TWA*, 713 F.2d 940, 954 (2d Cir. 1983), aff'd in part, rev'd in part, 469 U.S. 111 (1985) (same).

Nor can there be any serious question that the other defenses established in subsections (f)(1) and (2) constitute affirmative defenses. Subsection (f)(1) exempts employers from liability where compliance with the ADEA "would cause such employer . . . to violate the laws of the country in which such workplace is located." The employer is obviously better situated than an employee (often proceeding without counsel) to determine and prove whether its practices are required by foreign law. Subsection (f)(2) exempts from liability action taken "to observe the terms of a bona fide seniority system" or "bona fide employee benefit plan." When this Court held that the employee bore the burden of proof with respect to an employee benefit plan under a predecessor version of subsection (f)(2), *see Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 181 (1989), Congress promptly amended the statute to make clear that the opposite is true. *See* Older Workers Benefit Protection Act (OWPA), Pub. L. No. 101-433, § 103, 104 Stat. 978 (October 16, 1990) (as amended by Pub. L. No. 101-

521, 104 Stat. 2287 (November 5, 1990)); 29 U.S.C. § 632(f)(2).

In overruling *Betts*, Congress acted to "restore the original congressional intent in passing and amending" the ADEA. Pub. L. No. 101-133, § 101. The Senate Report explained that the revised subsection (f)(2)

> should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defense, section 4(f)(1) [29 U.S.C. § 623(f)(1)]. Accordingly, the language of section 4(f)(1) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . to take any action otherwise prohibited" by the ADEA (emphasis added)) has been incorporated as part of section 4(f)(2) and also section 4(l).

S. Rep. No. 101-263, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1535. The report goes on to

> endorse[] the position of the EEOC that the "reasonable factors other than age" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (See 29 CFR 1625.7), and express[] approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception. See *Criswell v. Western Airlines*, 709 F.2d 544, 552-553 (9th Cir.1982), affirmed on other grounds, 472 U.S. 400 (1985). See also *Laugeson v. Anaconda Co.*, 510 F2d 307, 315 (6th Cir.1975); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir.1978).

Id.

The purposes of the ADEA are best served by this long-established understanding of the RFOA provision. As the Court made clear in *Smith*, the "reasonableness" requirement places a modest burden on employers, and is more easily met

than the "business necessity" test. 544 U.S. at 243. It is not unfair to place that light burden on the employer, especially when the employer is best situated to marshal the evidence relating to the reasonableness of its business choices. Conversely, it is always difficult to prove a negative. Plaintiffs are poorly positioned to disprove the reasonableness of an employment practice when they do not have direct access to the reasons why the employer chose one method over another or the evidence relating to administrative cost or convenience that could support or undermine the reasonableness of that choice. Although Congress intended to afford employers substantial leeway to engage in reasonable practices that have an incidental disparate impact on older workers, it nonetheless intended to afford employees a meaningful chance to challenge practices that unreasonably injure protected employees. Requiring workers to prove the unreasonableness of the practice would, in a great many cases, eliminate the possibility of a remedy for conduct Congress plainly intended to prohibit.

2. *The EEOC's Interpretation Of The RFOA Provision Is Entitled To* Chevron *Deference.*

To the extent there is any ambiguity regarding the ADEA's allocation of the burden of proof under the RFOA provision, that ambiguity must be resolved by deferring to the EEOC's reasonable construction of the statute.

"This is an absolutely classic case for deference to agency interpretation." *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment). The ADEA expressly gives the EEOC authority to issue "such rules and regulations as it may consider necessary or appropriate for carrying out" the statute. 29 U.S.C. § 628. Pursuant to that authority, the EEOC promulgated a regulation, after notice and comment, providing that "the employer bears the burden of showing that the 'reasonable factor other than age' exists factually.'" 29 C.F.R. § 1625.7(e). That interpretation is consistent with a regulation

previously issued by the Department of Labor, which stated that the RFOA provision "must be construed narrowly, and the burden of proof . . . will rest on the employer." In its amicus brief filed in this case, the Commission interpreted its regulation to place the burden of persuasion under the RFOA defense squarely on the employer in disparate impact cases. *See* EEOC C.A. Br. 14; *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation, expressed in an amicus brief, is "controlling unless "'plainly erroneous or inconsistent with the regulation.'") (citation omitted). Under these circumstances, the agency's construction controls unless inconsistent with the text of the statute or otherwise unreasonable. *See Smith*, 544 U.S. at 243-44 (Scalia, J., concurring in part and concurring in the judgment); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600, n.17 (1981); *see also United States v. Mead Corp.*, 533 U.S. 218, 229-31 & n.12 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The label applied to the regulation is immaterial. "When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227 (quoting *Chevron*, 467 U.S. at 843-44). While interpretations "such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), the regulations at issue here were generated through notice-and-comment rulemaking. *See* 46 Fed. Reg. 47724, 47727 (1981). And, "[o]f course, the framework of deference set forth in *Chevron does* apply to an agency interpretation contained in a regulation." *Id.* (emphasis added).

3. *Nothing In* Wards Cove *or* Smith *Supports Converting The RFOA Affirmative Defense Into An Element Of The Plaintiff's Case In Chief.*

In light of the foregoing, the question is whether there is some significant reason to believe that Congress intended to treat the RFOA differently than all the other affirmative defenses established in Section 623(f)(1)-(2) and to impose the opposite allocation of burdens to that established by the long-standing EEOC and Department of Labor regulations. The court of appeals believed it had found such a reason in this Court's decisions in *Wards Cove* and *Smith*. Pet. App. 11a. That conclusion is wrong.

The court of appeals assumed that Congress intended the RFOA inquiry as a substitute for the "business necessity" test. *See* Pet. App. 11a-12a. Given that the plaintiff bore the burden of persuasion under the now-displaced "business necessity" test, the court reasoned, it only makes sense that the plaintiff would also bear the burden of proof on its replacement. *See id.* at 12a. That view cannot be squared with the text of the ADEA or the Court's decision in *Smith*.

"As the text makes clear, the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA." *Smith*, 544 U.S. at 246 (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original). *See* 29 U.S.C. § 623(f)(1). Whether an employment practice with a disparate impact is "otherwise prohibited" by the ADEA is governed by the traditional *Wards Cove* standards, *see Smith*, 544 U.S. at 240, which requires application of the "business necessity" test. Only if the employment practice fails that test – if, for example, an employee proves that other equally effective means with less disparate impact were available – does the RFOA defense come into play, providing a defense if the employer can demonstrate that the practice, while not a business necessity, was nonetheless reasonable.

There is nothing incongruous about placing the burden of disproving business necessity on the plaintiff, while placing the burden of proving reasonableness on the employer. The two issues are quite different: "[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Smith*, 544 U.S. at 243. The RFOA provision thus provides a broader defense, but one that must be proven by the defendant. Because the defense only comes into play when the employer's practice has been shown by the plaintiff to have an *unnecessary* disparate impact – a showing that would be sufficient to establish liability under Title VII – it is entirely appropriate for Congress to place the burden to avoid liability on the defendant.[12] An employment practice that unnecessarily harms protected workers, and which the employer cannot show to be even "reasonable," is one that Congress surely intended to prohibit under the ADEA.[13]

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[12] The court of appeals objected that this construction of the statute added unnecessary complexity to ADEA adjudications. Pet. App. 10a-11a n.5. But nothing prevents an employer from pretermitting the full analysis by establishing at the outset that it has a reasonable basis for the challenged employment practice. *See, e.g., Smith*, 544 U.S. at 241-43 (resolving case on RFOA defense without first fully analyzing whether practice was "otherwise prohibited").

[13] The Second Circuit also found support in a supposed textual similarity between the RFOA provision and Section 703(h) of Title VII, which provides, in relevant part: "nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test." 42 U.S.C. § 2000e-2(h). The court assumed that this provision would not be treated as an affirmative defense because, the court believed, it is the textual source of the "business necessity" test first announced in *Griggs*, upon which the plaintiff bears the burden of persuasion. *See* Pet. App. 14a. This argument fails at its premise. While this

II. This Court Also Should Decide Whether The "Reasonable Factors Other Than Age" Defense Precludes, As A Matter Of Law, Challenges To Reduction-In-Force Regimes That Confer Substantial Discretionary Decisionmaking Authority Upon Direct Supervisors.

Certiorari is also warranted to reverse the Second Circuit's determination that respondents' practice of allowing direct supervisors substantial discretionary authority to choose which workers to terminate in a reduction in force constitutes, as a matter of law, a "reasonable factor other than age." That holding conflicts with this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), and will have a broad impact on ADEA litigation generally unless corrected by this Court.

Court has said in passing dicta that *Griggs* was generally "construing 42 U.S.C. § 2000e-2(h)," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 n.21 (1975), it clearly did not mean that the business necessity test derives solely or even principally from that provision. *Griggs* itself noted that Section 2000e-2(h) addresses only discrimination arising from the administration of a "professionally developed ability test" and therefore did not even apply to all the employment practices challenged in *Griggs* itself. *See* 401 U.S. at 433 n.8 ("It has no applicability to the high school diploma requirement."). And it obviously does not apply to the full panoply of other employment practices subject to the business necessity test. Accordingly, in *Smith* this Court explained that "*Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view." 544 U.S. at 235. Later cases identified a textual basis in a different provision than cited in *Albemarle*: the statutory prohibition against actions that "'deprive individuals of employment opportunities or *otherwise adversely affect* his status as an employee because of such individual's' race or age." *Smith*, 544 U.S. at 235 (quoting 42 U.S.C. § 2000e-2(a)(2)) (emphasis in original).

A. The Second Circuit's Decision Conflicts With *Watson v. Fort Worth Bank & Trust.*

In *Watson*, this Court unanimously held that disparate impact challenges under Title VII were not limited to employment tests and criteria, but could also be applied to a company's practice of making employment decisions in reliance upon the subjective judgments of its direct supervisors. *See id.* at 990 (opinion for the Court); *id.* at 1011 (Stevens, J., concurring in the judgment). The plaintiff in *Watson* was repeatedly passed over for promotions as a bank supervisor. "The Bank . . . had not developed precise and formal criteria for evaluating candidates" but "relied instead on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled." *Id.* at 982. The court of appeals held that workers were required to challenge the denial of a promotion under such a system through a disparate treatment claim; they could not bring a disparate impact challenge to the system of discretionary decisionmaking. *Id.* at 984. This Court reversed. "If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." *Id.* at 990-91. The Court recognized that relying on the unchecked discretionary judgment of individual supervisors gives rise to a very real "problem of subconscious stereotypes and prejudices" controlling the distribution of employment opportunities, precisely the problem Congress intended Title VII to address. *Id.* at 990.

The same problem arises, and is met with the same solution, under the ADEA. The risk that discretionary decisionmaking systems may effectuate hidden stereotypes is aptly illustrated by the facts of this case. Respondents selected workers to terminate through a process that required supervisors to rank their workers based on vague and

subjective criteria such as the workers' "flexibility" and the "criticality of their skills." Pet. App. 5a-6a. Using such criteria risked giving effect to stereotypes of older workers as inflexible and outdated. And, in this case, use of those factors without implementation of meaningful checks led to "startlingly skewed results." Pet. App. 61a n.8. While about sixty percent of the workers considered for termination were over forty, "workers over forty constituted approximately *ninety-eight* percent of the laid-off workers." *Id.* at 42a (emphasis added). Statistical analysis revealed that the scores for "flexibility" and "criticality" had the greatest influence on who was selected for termination. *Id.*

The court of appeals nonetheless held that by enacting the RFOA defense, Congress intended to pervasively (perhaps completely) preclude disparate impact challenges to such practices. The Second Circuit acknowledged that "probative record evidence suggests that the factors used . . . could have been better drawn and that the process could have been better scrutinized to guard against a skewed layoff distribution." Pet. App. 17a. The court nonetheless held that the jury could not have rationally held in petitioners' favor, because of a legal principle that required entering judgment for respondents as a matter of law: "at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable." *Id.* at 19a.

This pronouncement of law effectively forecloses disparate impact challenges to subjective decisionmaking under the ADEA. And it unavoidably conflicts with this Court's decision in *Watson*, which read the common prohibitory language of Title VII and the ADEA to preclude discretionary decisionmaking processes that had an unjustified disparate impact. 487 U.S. at 990-91. There is nothing in the RFOA defense that authorizes a different rule for ADEA cases. As the Court recognized in *Watson*, "disparate impact analysis might effectively be abolished" if

construed not to extend to subjective decisionmaking processes. 487 U.S. at 990. While the "scope of disparate-impact liability under the ADEA is narrower than under Title VII," Smith, 544 U.S. at 240, it is not so narrow as to be non-existent. Instead, the statute provides a defense for practices that are "reasonable," a term that must be understood in light of the statutory purposes and the legal backdrop against which the statute was enacted and amended. A principal purpose of the statute is to eliminate unwarranted business practices that unreasonably deprive older workers of employment opportunities. *See* 29 U.S.C. § 621(a)(2). Giving supervisors free rein to engage in egregious discrimination on the basis of age, then failing to employ simple, inexpensive means to ensure that this discretion is not abused, is not reasonable in light of that purpose.

The Second Circuit also erred in focusing on the reasonableness of the employer's "objectives" – *i.e.*, retaining flexible workers with critical skills – rather than the means used to pursue that plainly reasonable goal. Petitioners' complaint is not that respondents attempted to lay off inflexible workers with less critical skills; their complaint is that the means chosen to fulfill that goal were so haphazard and unconstrained that age could be used by supervisors as an illegitimate proxy for flexibility and criticality, thereby exposing older workers to the central harm the ADEA was enacted to prevent. To prevent that from happening, the RFOA defense examines not only the purpose of the employment practice, but also whether that practice "was reasonably designed and administered so as to attain that stated purpose." EEOC C.A. Br. 17. While the employer plainly is not required to adopt the means with the least disparate impact, the extent to which "there are other equally effective ways, at comparable cost, of achieving the employer's stated goals with less disparate impact on older

employees . . . would bear on the reasonableness of the employer's choice." *Id.* at 20.[14]

The Second Circuit thus erred in holding that it is usually reasonable for an employer to rely on unchecked managerial discretion simply because the supervisors exercising that discretion had day-to-day experience with their employees.

B. This Court Should Use This Opportunity To Provide The Lower Courts And The EEOC Guidance On The Application Of The RFOA Defense.

Addressing the application of the RFOA defense in the context of this case would provide the lower courts much-needed guidance on the scope of disparate impact liability under the ADEA. Although this Court made clear in *Smith* that disparate impact liability is available, but narrower than under Title VII, it gave little guidance on how the generalized requirement of "reasonableness" is to be applied in the context of age discrimination in employment. It gave little direction, for example, as to whether the reasonableness analysis takes into account the degree of disparate impact caused by the defendant's chosen practice and the availability of alternatives, as urged by the EEOC, or whether, as held by the Second Circuit here, those factors are irrelevant. *Compare* EEOC C.A. Br. 19-20 *with* Pet. App. 18a-19a. On these questions, the courts cannot turn to Title VII precedents for guidance, as only the ADEA contains a RFOA defense.

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[14] *Smith* is not to the contrary. There, this Court held that in choosing *among* reasonable alternatives, an employer need not seek to minimize any disparate impact on older workers. 544 U.S. at 243. But this Court did not suggest that the availability of alternatives plays no role in determining whether a particular practice is, itself, reasonable. Indeed, it is difficult to imagine what factors a court could consider in the reasonableness analysis if not the degree to which the chosen practice injures older workers and the ease with which that injury may be avoided by the employer.

Given the amount of litigation under the ADEA, particularly in the context of reductions in force, more concrete guidance by this Court would be of substantial assistance to the lower courts and the EEOC, as well as to employers and workers alike.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Submitted After Remand: June 28, 2005
Decided: August 14, 2006)

Docket Nos. 02-7378-cv(L), 02-7474-cv(XAP)

CLIFFORD B. MEACHAM, Thedrick L. Eighmie, and Allen G. Sweet, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

James R. Quinn, Ph.D., Deborah L. Bush, Raymond E. Adams, Wallace Arnold, William F. Chabot, Allen E. Cromer, Paul M. Gundersen, Clifford J. Levendusky, Bruce E. Palmatier, Neil R. Pareene, William C. Reynheer, John K. Stannard, David W. Townsend, and Carl T. Woodman,

Consolidated-Plaintiffs-Appellees,

Hildreth E. Simmons, Jr., Henry Bielawski, Ronald G. Butler, Sr., James S. Chambers, Arthur J. Kaszubski, David J. Kopmeyer, Christine A. Palmer, Frank A. Paxton, Janice M. Polsinelle, Teofils F. Turlais, and Bruce E. Vedder,

Consolidated Plaintiffs-Appellees,

v.

KNOWLES ATOMIC POWER LABORATORY, a/k/a KAPL, Inc., Lockheed Martin Corporation, and John J. Freeh, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants-Cross Appellees.

Before: McLAUGHLIN, JACOBS, and POOLER, *Circuit Judges*. Judge Pooler dissents in a separate opinion.

Remand from the United States Supreme Court for reconsideration of our judgment in *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56 (2d Cir. 2004), in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005). Meacham affirmed the judgment of the United States District Court for the Northern District of New York (Homer, M.J.), inter alia, denying a post-verdict motion by defendants-appellants ("defendants") seeking judgment as a matter of law as to disparate-impact claims brought by plaintiffs-appellees ("plaintiffs") under the Age Discrimination in Employment Act, 29 U.S.C. § 631(a), and the New York Human Rights Law, N.Y. Exec. Law § 296(3-a)(a). We conclude that plaintiffs have failed to carry their burden of demonstrating that the challenged employment practice was unreasonable, and therefore vacate the judgment of the district court and remand with instructions to enter judgment as a matter of law in favor of defendants and to dismiss the case.

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Nicholas M. Inzeo, Acting Deputy General Counsel, Philip B. Sklover, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Barbara L. Sloan, Attorney, Equal Employment Opportunity Commission, Washington, DC, *for Amicus Curiae Equal Employment Opportunity Commission in support of Plaintiffs.*

Jennifer Bosco, National Employment Lawyers Association, San Francisco, CA; Cathy Ventrell-Monsees, Chevy Chase, MD, *for Amicus Curiae National Employment*

Lawyers Association in support of Plaintiffs.

DENNIS JACOBS, Circuit Judge:

This case returns to us on remand from the United States Supreme Court. See *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 62 (2d Cir. 2004) ("Meacham"), vacated and remanded by *KAPL, Inc. v. Meacham*, 544 U.S. 957 (2005). Originally, we had reviewed this case on appeal from a judgment of the United States District Court for the Northern District of New York (Homer, M.J.), inter alia, denying the motion of defendants-appellants ("defendants") seeking judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) after a jury verdict awarding damages to plaintiffs-appellees ("plaintiffs").[1] *See Meacham v. Knolls Atomic Power Lab.*, 185 F.Supp.2d 193 (N.D.N.Y. 2002). Plaintiffs are former employees of defendant Knolls Atomic Power Laboratories ("KAPL"), which designs advanced nuclear propulsion systems; trains sailors in their use; and oversees their maintenance, repair, refueling and decommissioning. Plaintiffs lost their jobs at the Knolls Atomic Power Laboratory (the "Lab") in an involuntary reduction in force ("IRIF"), and sued under the Age Discrimination in Employment Act, 29 U.S.C. § 631(a), ("ADEA") and the New York Human Rights Law, N.Y. Exec. Law § 296 (3-a)(a), ("HRL"). The jury verdict rested on a disparate-impact theory of liability. Previously, we held that (i) plaintiffs had established a *prima facie* case under the ADEA by demonstrating the disparate impact on older workers of the subjective decision-making involved in the IRIF; and (ii) notwithstanding defendants' facially legitimate business justification for the IRIF and its constituent parts, there was sufficient evidence of an equally effective alternative to the

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[1] The complete procedural history of this case in the district court can be found at *Meacham*, 381 F.3d at 65-68.

subjective components of the IRIF to support liability. *See Meacham*, 381 F.3d at 71-76. The Supreme Court vacated our judgment affirming the judgment of the district court and remanded for reconsideration in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005), which issued while defendants' petition for a writ of certiorari was pending. *See KAPL*, 544 U.S. 957. We have considered *City of Jackson* and the parties' supplemental briefing, and we now vacate the judgment of the district court and remand with instructions to enter judgment as a matter of law in favor of defendants on all claims and to dismiss the case.

I.

The Lab is funded by the United States Navy's Nuclear Propulsion Program ("NR") (jointly with the Department of Energy), which sets annual staffing limits for the facility in consultation with KAPL.[2] In fiscal year 1996, the NR imposed a more stringent limit on annual staffing levels and (at the same time) assigned additional work to the Lab that required new hires. Among the compliance measures adopted by KAPL was an IRIF in which plaintiffs, all of whom are over forty years of age, lost their jobs. *Meacham*, 381 F.3d at 62-63.

KAPL provided a guide for implementing the IRIF to participating (i.e., over-budget) managers. The guide instructed managers

> to select employees for the IRIF by listing "all employees in [their] group[s] on [a] matrix"; ranking them between zero and ten for performance, flexibility, and criticality of their skills; and giving up to ten points for company service. Managers were to rate performance based on an average of the two most recent performance appraisals. The tests for making a flexibility determination were whether

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[2] A complete factual description of this case can be found in *Meacham*, 381 F.3d at 62-65.

> the employee's "documented skills [could] be used in other assignments that [would] add value to current or future Lab work" and whether the employee was "retrainable for other Lab assignments." Critical skills were those skills that were critical to continuing work in the Lab as a whole. In addition, KAPL directed managers to consider whether the "individual's skill [was] a key technical resource for the NR program" and whether "the skill [was] readily accessible within the Lab or generally available from the external market."

Id. at 63-64 (brackets and emphasis in original). Once employees were thus ranked, managers were instructed to identify for layoff employees at the bottom-as necessary to achieve the required staff reduction-and then to perform an adverse impact analysis to determine whether the layoffs "might have a disparate impact on a protected class of employees." *Id.* at 64. To ensure compliance with the ADEA, managers were instructed to perform an analysis "similar" to the EEOC's "four-fifths" rule, by which (according to the guide) a "serious discrepancy" would exist "if the selection rate for a protected group is greater than 120% of the rate for the total population." *Id.* Once this process was completed,

> a review board was to assess the manager's selections "to assure adherence to downsizing principles as well as minimal impact on the business and employees." Finally, KAPL's general manager, John Freeh, and its [general] counsel, Richard Correa, were to review the final IRIF selections and the impact analyses.

Id.

In the end, 245 out of an estimated 2,063 eligible employees were placed on the matrices; thirty-one employees on the matrices were selected for layoff, thirty of whom were over forty years of age.

II.

In *Meacham*, we held that plaintiffs adduced evidence sufficient to establish a *prima facie* case for disparate-impact liability under the ADEA. *Id.* at 71-74. Plaintiffs identified a specific employment practice – KAPL's "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility'" in implementing the IRIF – and presented evidence supporting a reasonable inference that the practice caused the "startlingly skewed results." *Meacham*, 381 F.3d at 75 n. 8. We see nothing in *City of Jackson* that casts doubt on this holding. *City of Jackson* reiterated the requirement that disparate-impact plaintiffs under the ADEA are "'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities,'" 544 U.S. at 241 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989)) (emphasis in *City of Jackson*); in *Meacham*, we held that plaintiffs had satisfied that specificity requirement, *see Meacham*, 381 F.3d at 74.

A.

The matrix for adjudicating disparate-impact claims, once a plaintiff has made out a *prima facie* case, was first authoritatively established in *Wards Cove Packing Co. v. Atonio*, in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). 490 U.S. 642 (1989). The employer assumes the burden of producing evidence that the challenged employment practice has a legitimate business justification, *see id.* at 658-59; *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988); however, "'the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times,'" *Wards Cove*, 490 U.S. at 659 (quoting *Watson*, 487 U.S. at 997). Thus, after the employer has proffered a legitimate business justification, the plaintiff bears the burden of persuading the jury that the employer's justification does

not pass the test of "business necessity" – *i.e.*, either that the challenged practice does not serve, in a significant way, the legitimate employment goals of the employer or that "'other tests or selection devices, without a similarly undesirable ... effect, would also serve the employer's legitimate [hiring] interest[s].'" *Id.* at 659-60 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)); *see also Watson*, 487 U.S. at 998-99; *City of Jackson*, 544 U.S. at 243 (referencing "business necessity test"). In *Smith v. Xerox Corp.*, we extended this burden-shifting approach to disparate-impact claims under the ADEA. 196 F.3d 358, 365 (2d Cir.1999).

We held in Meacham that KAPL had advanced "a facially legitimate business justification for the IRIF and its constituent parts [–] 'to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions.'" *Meacham*, 381 F.3d at 74 (quoting *Meacham v. Knolls Atomic Power Lab.*, 185 F.Supp.2d 193, 213 (N.D.N.Y. 2002)). While such a justification, unchallenged, "would preclude a finding of disparate impact [liability]," *id.*, we ruled-following the precedent established in *Xerox* – that plaintiffs could prevail nevertheless by demonstrating that KAPL's justification failed the test of "business necessity," *i.e.*, by challenging the justification head-on or by showing "'that another practice would achieve the same result at a comparable cost without having a disparate impact on the protected group,'" *id.* at 74 (quoting *Xerox*, 196 F.3d at 365). We concluded that plaintiffs had discharged their burden because "[a]t least one suitable alternative is clear from the record: KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less subject to managerial bias."[3] *Id.* at 75.

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[3] According to the district court, plaintiffs overcame KAPL's showing of "business necessity" by presenting evidence of suitable alternative measures, i.e., a hiring freeze or expansion of KAPL's voluntary separation plan. However, these were alternatives to the

That analysis is untenable on this remand because, in *City of Jackson*, the Supreme Court held that the "business necessity" test is not applicable in the ADEA context; rather, the appropriate test is for "reasonableness," such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals. *See City of Jackson*, 544 U.S. at 243 ("Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."); *see also id.* at 239 (stating that there is no liability under the ADEA if the adverse impact of the challenged employment action is "attributable to a nonage factor that [i]s 'reasonable'"). The "reasonableness" test in *City of Jackson* is derived primarily from wording in the ADEA "that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *City of Jackson*, 544 U.S. at 233 (quoting ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1)).[4] The Court emphasized that (i) Congress had

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IRIF itself (which we concluded was justified), not alternatives to the specific components of the IRIF that plaintiffs had identified as discriminatory. See *Meacham*, 381 F.3d at 75.

[4] ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1), reads in pertinent part:

> It shall not be unlawful for an employer, employment agency, or labor organization ... to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than

refrained from addressing the ADEA in the Civil Rights Act of 1991, even though the Act had amended Title VII to expand the narrow construction of an "employer's exposure to liability on a disparate-impact theory" established in *Wards Cove*, *see City of Jackson*, 544 U.S. at 240; *see also* Civil Rights Act of 1991, 105 Stat. 1071; and (ii) "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment," *City of Jackson*, 544 U.S. at 240.

While "as a general rule, one panel of this Court cannot overrule a prior decision of another panel[,] ... an exception to this general rule arises where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent." *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003). In light of *City of Jackson*, it is clear that *Xerox* is no longer good law insofar as it holds that the "business necessity" test governs ADEA disparate-impact claims.[5]

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age, or where such practices involve an employee in a workplace in a foreign country ...

(emphasis added).

[5] Judge Pooler argues in dissent that *City of Jackson* "did not state or imply ... that the 'business necessity' part of the *Wards Cove* analysis ... no longer exists as part of the [ADEA] disparate impact analysis." Dissenting Op. at 148. That is an unnatural reading of *City of Jackson*, which (i) directly contrasts the "business necessity test" with the "reasonableness inquiry," City of Jackson, 544 U.S. at 243, and (ii) makes no suggestion in the course of establishing and applying the reasonableness inquiry that the business necessity test is available in the alternative. The dissent's approach would introduce a redundant (and counterintuitive) step in the analysis, with disparate-impact plaintiffs required to demonstrate that an employer's proffered business justification fails the business necessity test, at which point the employer would still prevail upon demonstrating that the

B.

It remains to apply the "reasonableness" test to plaintiffs' disparate-impact claims, which survived application of the "business necessity" test in *Meacham*.

First, we consider who bears the burden of persuasion with respect to the "reasonableness" of the employer's proffered business justification under the ADEA disparate-impact framework. The best reading of the text of the ADEA-in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable. *See Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) (holding that under *City of Jackson*, once employer has satisfied burden of producing evidence of legitimate business justification, to prevail "employee must ultimately persuade the factfinder that the employer's asserted basis for the neutral policy is unreasonable"). The following considerations lead us to that conclusion:

1. In substituting the "reasonableness" test for the "business necessity" test, *City of Jackson* nowhere suggested

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justification was nonetheless "reasonable." (No one has previously complained that the burden-shifting framework requires more steps.) The dissent also rests in part on the mistaken assumption that "the *Wards Cove* analysis is a judicially created doctrine," see Dissenting Op. at 148, and hence that the "business necessity" test established therein survives *City of Jackson* to the extent that the reasoning in *City of Jackson* was based on an interpretation of the "reasonable factors other than age" ("RFOA") provision of the ADEA, see ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1). But, as we demonstrate below, see supra at 142 - 143, the source of the "business necessity" test established in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), was later traced to Title VII § 703(h), 42 U.S.C. § 2000e-2 (h), see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), which (like the RFOA provision) is subject to interpretation as an affirmative defense, even though it is not.

that the burden of persuasion with respect to the legitimacy of the business justification was being shifted to the employer. That is not dispositive, however: the facts raised no close question as to the reasonableness of the employer's proffered business justification. *See City of Jackson*, 544 U.S. at 241-43.

2. *City of Jackson* says that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." *Id.* at 240. *Wards Cove* explained that the plaintiff bears the burden of persuasion to defeat the employer's "business necessity" justification because the plaintiff bears the ultimate burden under Title VII to "prove that it was 'because of [his] race, color,' etc., that he was denied a desired employment opportunity." *Wards Cove*, 490 U.S. at 660 (quoting 42 U.S.C. § 2000e-2(a)). The analogous § 4(a) of the ADEA, 29 U.S.C. § 623(a), is identical to that of Title VII "[e]xcept for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin.'" *City of Jackson*, 544 U.S. at 233. *City of Jackson* thus applies the reasoning and analysis of *Wards Cove* to disparate-impact claims under the ADEA, with the effect that an employer defeats a plaintiff's *prima facie* case by producing a legitimate business justification, unless the plaintiff is able to discharge the ultimate burden of persuading the factfinder that the employer's justification is unreasonable. Any other interpretation would compromise the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the "legitimacy" of its business justification. *Wards Cove*, 490 U.S. at 659-60.

3. *City of Jackson* reasoned that the "narrower" scope of disparate-impact liability under the ADEA (as compared with Title VII) is justified because "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment," and that as a result, "certain employment criteria that are routinely used may be reasonable

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despite their adverse impact on older workers as a group." *City of Jackson*, 544 U.S. at 240-41. It would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable.

In dissent, Judge Pooler argues that the "reasonable factors other than age" ("RFOA") provision, ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1), is in the nature of an affirmative defense for which the employer should bear the burden of persuasion. *See* Dissenting Op. at 148-152. In support of this argument, Judge Pooler observes that the provision (i) permits conduct that is "otherwise prohibited"-language that suggests an affirmative defense, *see id.* at 139; and (ii) is listed in the statute after the *bona fide* occupational qualification ("BFOQ") exception – an affirmative defense for which the Supreme Court has strongly suggested the employer bears the burden of persuasion, *see id.* at 139-140 (citing *City of Jackson*, 544 U.S. 228, 233 n.3 (2005)); *see also Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n. 24 (1985); *Air Line Pilots Ass'n v. TWA*, 713 F.2d 940, 954 (2d Cir. 1983) (establishing that BFOQ provision "may be invoked only if an employer proves 'plainly and unmistakably' that its employment practice meets the 'terms and spirit' of the remedial legislation"), *aff'd in part & rev'd in part on other grounds sub nom TWA v. Thurston*, 479 U.S. 111 (1985).[6] There is some force to this argument, but it does

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[6] A provision of the regulations promulgated by the Equal Employment Opportunity Commission ("EEOC"), the agency statutorily charged with implementing the ADEA, see 29 U.S.C. § 628, interprets ADEA § 4(f)(1) as placing the burden of persuasion with respect to a RFOA on the employer in the context of disparate treatment. See 29 C.F.R. 1625.7(e) ("When the exception of a [RFOA] is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the [RFOA] exists factually.") (internal quotation marks omitted). We are disinclined to accord this interpretation any weight given that (i)

not withstand *City of Jackson*, which emphasized that there are reasonable and permissible employment criteria that correlate with age. (This case is a fine example of the phenomenon.) It is therefore hard to see how an ADEA plaintiff can expect to prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable.[7]

Our conclusion is reinforced by the history of the development of the "business necessity" test. The Supreme Court established the "business necessity" test in *Griggs v. Duke Power Co.*, explaining that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. 424, 432 (1971). Although *Griggs* failed to locate the source of the test in any particular statutory provision of Title VII, *Wards Cove* later clarified that the "burden" referred to in *Griggs* was the burden of production, not persuasion, *see supra*; and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), located the source of the "business necessity" test in Title VII § 703(h), 42 U.S.C. § 2000e-2 (h), which provides that it shall *not*

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we are interpreting the RFOA provision in the context of disparate impact; and (ii) *City of Jackson* directly contradicts 29 C.F.R. 1625.7(d), which interprets the RFOA provision as mandating a "business necessity" test when a plaintiff has established a prima facie case of disparate impact, and thereby casts substantial doubt on the soundness of the relevant EEOC regulations.

[7] The dissent points out that *City of Jackson* characterized the BFOQ exception as an "affirmative defense," see Dissenting Op. at 149 (citing City of Jackson, 544 U.S. at 233 n. 3); this makes it all the more telling that the opinion did not so characterize the RFOA provision. Moreover, the cases cited in the dissent as characterizing the RFOA provision as an affirmative defense, see Dissenting Op. at 151, are inapt because they all (i) concern suits alleging disparate treatment, not disparate impact, and (ii) pre-date *City of Jackson*.

> be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

This section, like the RFOA provision in the ADEA, lends itself to interpretation as an affirmative defense, with the burden of persuasion on the employer; but the Supreme Court has determined that it is not, and we are convinced that there is insufficient reason to depart from that analysis in interpreting the ADEA.

Applying the *Wards Cove* burden shifting framework – as modified in the ADEA context by *City of Jackson* – to the facts before us, we reaffirm our conclusion in *Meacham* that KAPL satisfied its burden of producing evidence suggesting that a legitimate business justification motivated the challenged components of the IRIF. *See supra.* But we must revisit that question because we followed the district court in characterizing KAPL's legitimate justification as the reduction of KAPL's "'workforce while still retaining employees with skills critical to the performance of KAPL's functions.'" *Meacham*, 381 F.3d at 74 (quoting *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193, 213 (N.D.N.Y. 2002)). Evidence supports that business objective, but our characterization did not conform to the specific employment practice identified by the plaintiffs: the IRIF's "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" *supra.* Defendants' burden was to advance a justification for these features of the IRIF, and it was plaintiffs' burden to demonstrate that *that* justification is unreasonable. The record demonstrates that defendants discharged their burden, and plaintiffs did not.

At trial, defendants' expert witness – a specialist in industrial psychology with substantial corporate downsizing experience – testified that the criteria of "criticality" and "flexibility" were ubiquitous components of "systems for making personnel decisions," and that the subjective components of the IRIF were appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation. KAPL's staffing manager testified to the importance of criticality and flexibility to ensuring that KAPL could carry on operations with a shrinking workforce. This evidence unquestionably discharged defendants' burden of production – it suggested that the specific features of the IRIF challenged by plaintiffs were routinely-used components of personnel decisionmaking systems in general, and were appropriate to the circumstances that provoked KAPL's IRIF.

The next question is whether plaintiffs discharged their burden of demonstrating that the justification was unreasonable. "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *City of Jackson*, 544 U.S. at 243; *see also id.* at 240 ("[T]he scope of disparate-impact liability under ADEA is narrower than under Title VII."). In determining whether plaintiffs have demonstrated that KAPL's relatively subjective and unaudited procedures for measuring "criticality" and "flexibility" were unreasonable, we keep in mind that "we are not a super-personnel department." *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 106 (2d Cir. 2001); *see also Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices."). "It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a

court to review." *Zahorik v. Cornell Univ.*, 729 F.2d 85, 96 (2d Cir.1984); *but see Albemarle Paper*, 422 U.S. at 433 (expressing concern over "a 'standard' that was extremely vague and fatally open to divergent interpretations"). The range of reasonable personnel systems is wide in a fluid and adaptive economy.

As we observed in *Meacham*, plaintiffs presented probative evidence tending to show that: (i) KAPL's criteria were subjective (and "imprecise at best"); (ii) "the subjectivity disproportionately impacted older employees"; (iii) KAPL "observed that the disproportion was gross and obvious"; and (iv) KAPL "did nothing to audit or validate the results." *Meacham*, 381 F.3d at 75 & n. 7.

Moreover, even though KAPL implemented some of its established guidelines for the IRIF, *see supra*, compliance was uneven. Managers were trained to ensure that they understood the matrix criteria definitions and the process for analyzing the completed matrices. But the company's only disparate-impact analysis of the employees selected for layoff was done by a human resources manager who lacked training or serious preparation, and whose technique was to compare the average age of the workforce before and after the IRIF, *see Meacham*, 381 F.3d at 64; given the size of KAPL's workforce, this technique was inadequate to identify age-related discrepancies resulting from a personnel action that affected only thirty-one employees. *See id.*

Per the guide instructions, KAPL's review board assessed the design and execution of the IRIF-including the process for constructing matrices and the final layoff decisions-to ensure that they conformed to KAPL's business needs; but the review board did not assess age discrimination issues. *See id.* KAPL's general counsel conducted a legal review of the IRIF after its completion, consulting with the company's human resources representatives and some managers about employee scoring and placement on the matrices, as well as about individual layoff decisions. *See id.* The general

counsel was familiar with the ADEA and apparently aware of the viability of the disparate-impact theory in the Second Circuit at the time; however, he did not analyze the *results* of the IRIF, explaining that he was only concerned with whether "[I]RIF decisions were properly made" and "legitimate." *Id.*

Plaintiffs, who bear the burden of demonstrating that KAPL's action was unreasonable, did not directly challenge the testimony of KAPL principals regarding the planning and execution of the IRIF. However, Dr. Janice Madden, an employment discrimination expert and experienced statistician, testified for plaintiffs that (i) the probability of the age disparities at various stages of the IRIF happening by chance was so low as to suggest to a high degree of statistical significance that the disparities were not the result of chance;[8] (ii) "criticality" and "flexibility" were the criteria most responsible statistically for the selection of individuals to be laid off; and (iii) the procedures established for review of the decisions made by individual managers "did not offer adequate protections to keep the prejudices of managers from influencing the outcome." *Id.* at 65.

Have plaintiffs discharged their burden? It is important to distinguish between evidence that KAPL's IRIF resulted in an unlikely, "startlingly skewed" age distribution of laid-off employees-which is relevant to plaintiffs' *prima facie* case – and evidence that KAPL's business justification for the specific design and execution of the IRIF was "unreasonable." The fact that the IRIF resulted in a skewed age distribution of laid-off employees is not itself necessarily probative of whether KAPL's business justification for particular features of its IRIF was "reasonable." As the Supreme Court observed in *City of Jackson*, age is often highly correlated with legitimate employment needs. *See*

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[8] Dr. Madden explained that a disparity is statistically significant if "the probability that [it] could happen by chance is less than 5 percent." *Meacham*, 381 F.3d at 65.

City of Jackson, 544 U.S. at 240 ("[A]ge, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."). To draw a negative inference from the ex post age distribution of laid-off employees would inhibit reliance on reasonable and useful employment criteria that are highly correlated with age.

The probative record evidence suggests that the factors used in KAPL's IRIF could have been better drawn and that the process could have been better scrutinized to guard against a skewed layoff distribution. However, KAPL set standards for managers constructing matrices and selecting employees for layoff, and it did monitor the implementation of the IRIF. The IRIF restricted arbitrary decision-making by individual managers, and the measures that KAPL put in place to prevent such arbitrary decision-making and ensure that the layoffs satisfied KAPL's business needs – while not foolproof – were substantial. Any system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable.

"[T]here may have been other reasonable ways for [KAPL] to achieve its goals" (as we held in *Meacham*, 381 F.3d at 75), but "the one selected was not unreasonable." *City of Jackson*, 544 U.S. at 243.

III.

"[S]ince claims under the HRL are analyzed identically to claims under the ADEA[,] ... the outcome of an employment discrimination claim made pursuant to the HRL is the same as it is under the ADEA...." *Xerox*, 196 F.3d at 363; *see also Leopold v. Baccarat, Inc.*, 174 F.3d 261, 264 n.1 (2d Cir.1999). Moreover, the HRL contains a RFOA

exception identical to that contained in the ADEA. See N.Y. Exec. L. § 296(3-a)(d). Therefore, we have no reason to think that, in analyzing the HRL, New York will reject our interpretation of the impact of *City of Jackson* on analysis of the ADEA. Plaintiffs' HRL claims therefore fail for the same reason as their ADEA claims: plaintiffs have not satisfied their burden of demonstrating that defendants' business justification was unreasonable.[9]

IV.

Because we conclude that plaintiffs' ADEA and HRL claims fail, we reach plaintiffs' cross-appeal challenging the decisions of the district court (i) to strike the report of plaintiffs' expert, Madden, at the end of the liability phase of the trial, and (ii) to exclude from evidence the document entitled "Eligibility Requirement Options for [Voluntary Separation Plan]." We review a district court's evidentiary rulings "only for manifest error because the decision of which evidence is admissible is one that is committed to the district judge's discretion." *Barrett v. Orange County Human Rights*

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[9] We held in *Meacham* that defendants had waived their argument that "a disparate impact claim is conceptually impossible" under the HRL because they did not raise the argument until their post-verdict motion. See *Meacham*, 381 F.3d at 71. We enforce the waiver and do not consider the argument. However, defendants have not waived the argument that their business justification was "reasonable," because defendants have consistently maintained that plaintiffs' HRL claims should be dismissed because their ADEA claims fail. Defendants repeatedly sought judgment as a matter of law with respect to both the ADEA and HRL claims, and the district court analyzed the HRL and ADEA claims together. See *Meacham*, 381 F.3d at 66 ("[D]efendants moved for summary judgment dismissing all of plaintiffs' claims.") (emphasis added); *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193, 206 (N.D.N.Y. 2002) ("A plaintiff may establish violations of the ADEA and the HRL under theories of disparate treatment and disparate impact.").

Comm'n, 194 F.3d 341, 346 (2d Cir. 1999). The district court committed no manifest error, because (i) Madden testified at length as to the contents of her report and (ii) the document relating to the voluntary separation plan was immaterial because-as we held in *Meacham* – the plan was not a suitable alternative to the challenged employment practice. *See Meacham*, 381 F.3d at 75.

* * *

For the reasons set forth above, we vacate the judgment of the district court, and remand with instructions to enter judgment as a matter of law in favor of defendants on all claims and to dismiss the case.

POOLER, Circuit Judge, dissenting:

I respectfully dissent because I do not agree that *Smith v. City of Jackson*, 544 U.S. 228 (2005) requires vacatur of the district court judgment. The concerns animating my disagreement with the majority are (1) the majority improperly conflates the analysis of proof of a reasonable factor other than age ("RFOA") with the legitimate business justification analysis as it is used in a disparate impact analysis; (2) the majority errs by assigning to plaintiffs the burden of proving that a RFOA does not exist; and (3) the majority improperly reaches the asserted RFOA error because, although defendants pleaded an affirmative RFOA defense, they did not seek a charge or a verdict sheet question on that defense, thus requiring that we find fundamental error, which does not exist, to reach the claimed error.

I. Impact of *City of Jackson* on ADEA Disparate Impact Analysis.

City of Jackson has a three-fold impact on ADEA disparate impact analysis. First, the Supreme Court held 23 that disparate impact claims can be proven under the ADEA.

544 U.S. at 240. Second, it held that the disparate impact analysis contained in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), continued to apply in ADEA cases, albeit not in Title VII cases. See *City of Jackson*, 544 U.S. at 240 ("*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."). Third, the Court held that an employee could not defend against proof of a RFOA by showing that another reasonable method to reach the employer's goals existed. *See id.* at 243 ("While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.").

As indicated in the majority opinion, *City of Jackson*'s first holding is consonant with our precedent and needs no further analysis. The second holding – that a *Wards Cove* disparate impact analysis remains applicable – does require further examination. The *Wards Cove* Court analyzed the judicially created burdens of proof for disparate impact analysis under Title VII. *See* 490 U.S. at 656-661. The Court held that after the plaintiffs establish a *prima facie* case, the analysis shifts to the legitimacy of the business justification proffered by the employer, and that "the dispositive issue [at that stage] is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. The Court then held that plaintiff retained the ultimate burden of proving discrimination and added that if the "[employees] cannot persuade the trier of fact on the question of petitioners' business necessity defense, [the employees] may still be able to prevail." *Id.* at 660. To succeed at this stage, the employees must persuade the factfinder that "'other tests or selection devices, without a similarly undesirable racial effect would also serve the employer's legitimate [hiring] interest[s].'" Id. (quoting

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)). The *City of Jackson* Court's adherence to *Wards Cove* in the ADEA disparate-impact analysis does not change the law of this circuit because we have long used the *Wards Cove* analysis in ADEA disparate impact cases. *See, e.g., Meacham v. KAPL*, 381 F.3d 56, 71-76 (2d Cir. 2004).

At trial, the district court correctly stated the *Wards Cove* burdens in its charge, and defendants did not object. The jury then found that plaintiffs satisfied their burden of proving disparate-impact discrimination. Although the district court set aside the jury's finding that defendants did not proffer a legitimate business justification, *see Meacham*, 381 F.3d at 74, it refused to set aside the verdict-and we affirmed-because plaintiffs had identified an alternative that would equally well serve KAPL's business purpose, *id.* at 75. Therefore, both the district court and this court performed exactly the analysis required by *Wards Cove*. As a result, the second holding of *City of Jackson* does not require vacatur of the district court judgment.

I turn, then, to the third holding in *City of Jackson* – that the RFOA exemption of 29 U.S.C. § 623(f)(1) cannot be defeated by a showing that other equally effective alternatives that do not have an adverse impact on older workers are available. In vacating the district court's judgment and directing the dismissal of the complaint, the majority holds that "[i]n light of *City of Jackson*, it is clear that *[Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999)] is no longer good law insofar as it holds that the 'business necessity' test governs ADEA disparate impact test claims." It is here that the majority, in my view, impermissibly conflates the Supreme Court's holding on an age discrimination disparate impact analysis with its holding on the RFOA defense. The Supreme Court held that the *Wards Cove* analysis continues to govern ADEA disparate impact claims. *See City of Jackson*, 544 U.S. at 240. It did not state or imply that the "business necessity" part of the *Wards Cove* analysis–on

which plaintiffs bear the burden of proof–no longer exists as part of the disparate impact analysis.

We should not make the leap between a disparate-impact analysis and a RFOA analysis–which the Supreme Court did not make explicitly or implicitly in *City of Jackson*–because the *Wards Cove* disparate impact analysis and RFOA are very different doctrines. Throughout the entire *Wards Cove* analysis, the plaintiffs continue to bear the burden of persuasion with respect to disparate impact. *See* 490 U.S. at 659. However, in a RFOA analysis, as I argue below, the employer bears the burden of proof. Further, the *Wards Cove* analysis is a judicially created[1] doctrine setting forth what employees must demonstrate to prevail on a disparate impact claim under the ADEA, *see Wards Cove*, 490 U.S. at 650-661, while the RFOA is a statutory exemption to liability otherwise established by plaintiffs under a disparate impact analysis, *see* 29 U.S.C. § 623(f)(1); *City of Jackson*, 544 U.S. at 239 (reasoning that "[i]t is ... in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable

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[1] The majority quarrels with the phrase, "judicially created," because "*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) located the source of the 'business necessity' test in Title VII § 703(h), 42 U.S.C. § 2000e-2(h), which provides that" the administration of professionally developed ability tests not designed, intended, or used to discriminate on a prohibited ground is not an unlawful employment practice. Majority op. at 141 n. 5. However, the Supreme Court has applied its disparate impact analysis in situations far removed from the tests and practices listed in Section 2000e-2(h). See, *e.g.*, *Wards Cove*, 490 U.S. at 657 (nepotism, separate hiring halls, rehire preferences, and subjective decision making). The use of disparate impact analysis in areas not covered by Section 2000e-2(h) is certainly judicially created. Further-and more important-Section 2000e-2(h) does not contain the words, "otherwise prohibited," which, as I explain below at [7-15] are important in establishing that the RFOA provision is an affirmative defense.

to a nonage factor that was 'reasonable.'"). The majority implicitly suggests that because the RFOA provision does not require that an employer use the most reasonable alternative or even an equally reasonable alternative, the plaintiffs' demonstration of equally effective practices that would serve the employer's legitimate goal no longer serves any purpose. This logic is sound only if one accepts two premises: (1) that "legitimate business justification" means the same thing as "reasonable factor other than age," and (2) that the employee bears the burden of proof under the RFOA provision. As outlined in the next section, existing cases, legislative history, and statutory structure overwhelmingly support the view that employers bear the burden of establishing a RFOA. In addition, I am not at all certain that "legitimate business justification" and "reasonable factor other than age" should be construed to mean the same thing. Therefore, I believe the district court and this court applied *Wards Cove* correctly to plaintiffs' disparate-impact claim.

II. Burden of Proof

To determine whether a claim that an employment determination rests on a "reasonable factor other than age," within the meaning of 29 U.S.C. § 623(f)(1), (1) is properly characterized as an affirmative defense, placing the burden of proof on the employer, or (2) must be negated as part of plaintiff's overall burden of proving age discrimination within a *Wards Cove* disparate impact analysis, I look first to the language of the statute that creates both liability and exemptions from liability for age discrimination, 29 U.S.C. § 623. *See Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir.2006) ("Statutory analysis begins with the text and its plain meaning, if it has one.") Only if the statute is ambiguous, is resort to canons of construction permitted. *See id.* If the canons of construction fail to clarify the ambiguity, legislative history may be examined to determine congressional intent. *See id.* at 338.

The ADEA provides that "It shall be unlawful for an employer ... to limit, segregate, or classify his employees in any manner which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). Section 623(f) creates five exceptions to liability that would otherwise exist under Section 623(a). In Section 623(f)(1), Congress exempted from unlawfulness "any action otherwise prohibited" if age was a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"; the "otherwise prohibited" action was based on reasonable factors other than age; or the action was required by a law in the country in which the workplace was located. With limitations, Section 623(f)(2), exempts an action "otherwise prohibited under [this section]" if it is taken "to observe the terms of a bona fide seniority system ... not intended to evade the purposes of this chapter" or "to observe the terms of a bona fide benefit plan." The consistent use of the words, "otherwise prohibited," suggests that Section 623(f) creates affirmative defenses because the various fact patterns listed are exceptions to liability that would otherwise exist.

However, even assuming that Section 623(f)(1) is ambiguous, at least two key canons of construction support placing the burden of proof on the employer. First, we must construe the meaning of Section 623(f)(2) in light of Section 623 as a whole. *See Gottlieb*, 436 F.3d at 338. The architecture of Section 623 is simple. Section 623(a), (b), (c), (d), and (e) define unlawful practices. Then, Section 623(f) creates exemptions to liability for certain actions prohibited by Section 623(a), (b), (c), and (e).[2] If plaintiffs were required to show that no RFOA existed, Congress logically

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[2] Section 623(d) is the ADEA's retaliation provision. Thus the Section 623(f) exemptions would not be relevant.

would have included this provision within the liability sections, rather than within the exemption sections.

The second rule of construction favoring the interpretation of Section 623(f) as creating affirmative defenses is the doctrine of in pari materia. Where two sections are in the same statute and "share the same purpose," they "can, as a matter of general statutory construction, be interpreted to be in pari materia," that is, as having the same meaning. *United States v. Carr*, 880 F.2d 1550, 1553 (2d Cir. 1989). All five of Section 623(f)'s exemptions are expressed in parallel fashion: conduct that would be "otherwise prohibited" is rendered lawful if certain facts exist. Further, the first of the Section 623(f)(1) exemptions-the bona fide occupational qualification ("BFOQ") defense-is an affirmative defense. *See City of Jackson*, 544 U.S. at 233 n. 3. The principle of in pari materia leads me to believe that, because the RFOA provision is in the same section as the BFOQ defense and uses the same words–"otherwise prohibited"–Congress likewise intended the RFOA provision as an affirmative defense.

Interpreting the RFOA provision and other Section 623(f) exemptions as affirmative defenses is also supported by Congress's enactment of the Older Workers Benefit Protection Act ("OWBPA"), Pub.L. No. 101-433, 104 Stat. 978 (1990) (codified in relevant part at 29 U.S.C. § 623(f)(2)), after the Supreme Court held that the benefit plan exemption of Section 623(f)(2) did not create an affirmative defense, *see Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 181 (1989). Prior to 1990, the Section 623(f)(2) exceptions-bona fide seniority systems and benefit plans-did not include language specifying that these exemptions apply to conduct "otherwise prohibited." *See* 29 U.S.C. § 623(f)(2) (1990). In 1989, the Supreme Court held that the bona-fide-benefit plan exception "is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the

employee benefit plan context" and that plaintiffs were required to show that a benefit plan was a subterfuge in order to prevail. *Betts*, 492 U.S. at 181. Congress responded by enacting OWBPA, which modifies the ADEA in significant respects. In its findings, Congress indicated that *Betts* required "legislative action ... to restore the original congressional intent in passing and amending the [ADEA]." Pub.L. 101-133 § 101. For our purposes, the relevant change was the insertion of "any action otherwise prohibited" into Section 623(f)(2). *See id.* § 103.

A detailed report of the Senate Labor and Human Resources Committee concerning OWBPA states that Congress inserted "otherwise prohibited," "language ... that is commonly understood to signify an affirmative defense" into Section 623(f)(2) to make it clear "that the employer bears the burden to plead and prove the defenses and exceptions established in that section." S. Rep. No. 101-263, as reprinted in 1990 U.S.C.C.A.N. 1509, 1535. The Committee added that it endorsed "the uniform body of federal court decisions" holding that the BFOQ exception was an affirmative defense as well as circuit court decisions imposing the burden of proving the reasonable-factors defense on the employer. *Id.* (citing *Criswell v. Western Airlines*, 709 F.2d 544, 552-553 (9th Cir.1982), *affirmed on other grounds*, 472 U.S. 400 (1985); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975), *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir. 1978)).

Of course, the OWBPA's legislative history is not relevant to determining the intent of the legislators who enacted Section 623(f)(1), which was not changed by OWBPA. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 118-19 (1988). However, the legislative history discussed is probative of the meaning Congress normally assumes will be ascribed to the words "otherwise prohibited" when they preface exemptions to liability.

Finally, several circuits have characterized the RFOA provision and other Section 623(f) exemptions as affirmative defenses. *See Jankovitz v. Des Moines Indep. Cmty. Dist.*, 421 F.3d 649, 651 (8th Cir. 2005) (characterizing as an affirmative defense employer's claim of a bona fide voluntary early retirement incentive plan pursuant to 29 U.S.C. § 623(f)(2)(B)(ii)); *Erie County Retirees Assoc. v. County of Erie, Pa.*, 220 F.3d 193, 199 (3d Cir.2000) (characterizing the RFOA exemption as an "affirmative defense"); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 639 (9th Cir.1993) (stating that "[o]nce the plaintiff establishes a prima facie case that age was a determining factor in the employment decision, the defendant-employer can rebut the prima facie case and/or assert any number of affirmative defenses [including] the RFOA defense."); *Heiar v. Crawford Co., Wis.*, 746 F.2d 1190, 1197-99 (7th Cir. 1984) (requiring employer to prove that age was a BFOQ); *Cova*, 574 F.2d at 959-60 (holding that if the plaintiff makes out a prima facie case of age discrimination, the employer must "show[ ] that the discharge was 'based on reasonable factors other than age,'" and, if the employer meets that burden, the plaintiff must show that "age was a determining factor in the discharge") (quoting 29 U.S.C. § 623(f)(1)); *Laugesen*, 510 F.2d at 313 (stating in dicta that the BFOQ exemption is an affirmative defense).[3] The majority cites only one case, *Pippin v. Burlington Resources*, 440 F.3d 1186, 1200 (10th Cir. 2006), holding that an employee bears the burden of disproving an asserted

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[3] The majority characterizes these decisions as "inapt," Majority op. at 143 n. 7 because they are disparate treatment cases and were decided prior to *City of Jackson*. The majority's position provokes two questions: (1) Is there any evidence that Congress intended different burdens of proof for the RFOA provision depending on whether it is employed in a disparate treatment or a disparate impact case? and (2) Is it logical to assume that the Supreme Court rejected existing interpretations of the RFOA provision sub silentio and without analysis?

RFOA. Because *Pippin* contains no analysis, it does not disturb my conclusion that the weight of authority indicates that Congress intended that the employer bear the burden of proving a RFOA.

Based on the language and structure of the statute, the weight of authority, and the legislative history of the OWBPA, I conclude that the RFOA exemption is an affirmative defense. The majority, however, holds that the employees must disprove the employer's claim of a RFOA because (1) the *City of Jackson* court "nowhere suggested that the burden of persuasion with respect to the legitimacy of the business justification was being shifted to the employer"; (2) *City of Jackson* holds that "'*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA,'" and "*Wards Cove* explained that the plaintiff bears the burden of persuasion to defeat the employer's 'business necessity' justification because the plaintiff bears the ultimate burden under Title VII to 'prove that it was "because of [his] race, color," etc., that he was denied a desired employment opportunity,'" [id.] (quoting *City of Jackson*, 544 U.S. at 240, and *Wards Cove*, 490 U.S. at 660); and (3) *City of Jackson* acknowledged that age-as opposed to race and sex-does sometimes correlate with reasonable performance factors and thus the ADEA has a narrower scope that Title VII, [id.].

My first problem with the majority's reasoning is that the *Wards Cove* Court did not analyze the "identical language" at issue in this case. At issue in this case is 29 U.S.C. § 623(f)(1), a statute that was not construed in *Wards Cove*. The burden of proving a disparate impact claim remains exactly as it is described in *Wards Cove*, but that does not mean that the burden of proving the statutory RFOA exemption has been changed by *Wards Cove* or by *City of Jackson*. After *City of Jackson*, it remains necessary for a court interpreting Section 623(f)(1) to adhere to the ordinary principles of statutory interpretation applied above. Further, *City of Jackson*'s

acknowledgment that age does sometimes correlate with ability or inability to do a job explains why Congress did not amend the ADEA–as it did Title VII–to change certain aspects of *Wards Cove* and why Congress enacted the RFOA provision but not why the RFOA provision should be read to impose the burden of proof on a particular party. *See City of Jackson*, 544 U.S. at 240-41. Therefore, the possible correlation between age and certain work-related factors has no bearing on where the RFOA burden should rest. Rather, an appropriate statutory analysis mandates construing the RFOA provision as imposing the burden on the employer to prove that a RFOA exists.

III. Waiver and Fundamental Error

Where a claim of error has its genesis in the charge or the verdict sheet and the party relying on the error for reversal or a new trial did not object at trial, the error is waived and can be reached only if fundamental error occurred. *See Patrolmen's Benevolent Assoc. of the City of New York v. City of New York*, 310 F.3d 43, 54 (2d Cir. 2002). "Fundamental error is more egregious than the 'plain' error that can excuse a procedural default in a criminal trial, and is so serious and flagrant that it goes to the very integrity of the trial." *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 (2d Cir. 2002) (internal citation and quotation marks omitted).

Defendants, who, in my view, bear the burden of proving a RFOA, included RFOA as an affirmative defense to liability in their answer. However, the charge did not include an instruction on the RFOA exemption. Defense counsel did not object to the court's charge in any respect. Nevertheless, defendants argue that they did not waive any aspect of a disparate impact analysis because *City of Jackson* "represents a change in the prevailing law under the ADEA, and where there has been an intervening change ... no waiver may be found." Appellants' Reply Br. at 9. This argument is not valid. Since the RFOA was enacted, it has been clear that employers can defend against disparate impact liability by

showing that employees were selected for termination based on a reasonable factor other than age. Further, courts construing Sections 623(f)(1) and (2) have generally found that they create affirmative defenses to liability. *See Jankovitz*, 421 F.3d at 651; *Erie County Retirees Assoc.*, 220 F.3d at 199; *Baker*, 6 F.3d at 639; *Cova*, 574 F.2d at 959-60; *Laugesen*, 510 F.2d at 313. Finally, defendants themselves pleaded RFOA as an affirmative defense. Under these circumstances, there can be no claim that changes in the law excused defendants' waiver, and defendants must demonstrate that the court's failure to include a RFOA instruction in the charge and a RFOA question in the verdict sheet constituted fundamental error.

I see no fundamental error. Parties, as the masters of their cases, should and usually will request the charges that they believe their evidence supports and should object when those charges are omitted. From all that appears in the record before us, defendants may have made a strategic decision not to press the RFOA defense, believing that it would be easier to require plaintiffs to establish disparate impact under the *Wards Cove* analysis than for defendants themselves to prove a reasonable factor other than age. In addition, I do not consider that a jury that had been properly charged that defendants bear the burden of proving a RFOA would necessarily find for defendants. Such a jury could permissibly find that defendants had not established a RFOA based on the unmonitored subjectivity of KAPL's plan as implemented.

CONCLUSION

For the reasons discussed above, we should adhere to our prior decision and reinstate the vacated judgment. I therefore respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: September 10, 2003 Decided: August 23, 2004)

Docket Nos. 02-7378 (L); 02-7474 (XAP)

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, and ALLEN G. SWEET, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

James R. Quinn, Ph.D., Deborah L. Bush, Raymond E. Adams, Wallace Arnold, William F. Chabot, Allen E. Cromer, Paul M. Gundersen, Clifford J. Levendusky, Bruce E. Palmatier, Neil R. Pareene, William C. Reynheer, John K. Stannard, David W. Townsend, and Carl T. Woodman,

Consolidated-Plaintiffs-Appellees,

Hildreth E. Simmons, Jr., Henry Bielawski, Ronlad G. Butler, Sr., James S. Chambers, Arthur J. Kaszubski, David J. Kopmeyer, Christine A. Palmer, Frank A. Paxton, Janice M. Polsinelle, Teofils F. Turlais, and Bruce E. Vedder,

Consolidated-Plaintiffs-Appellees,

v.

KNOLLS ATOMIC POWER LABORATORY, a/k/a KAPL, Inc., Lockheed Martin Corp., and John J. Freeh, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants-Cross-Appellees.

Before: McLAUGHLIN, JACOBS, and POOLER, *Circuit Judges*.

Appeal from a judgment, entered after a jury trial, finding defendants liable for disparate impact age discrimination under federal and state law, finding that defendants' violation was willful, and awarding plaintiffs liquidated damages, front and back pay, damages for mental anguish, interest, and attorney's fees.

Affirmed.

MARGARET A. CLEMENS, Nixon Peabody LLP, Rochester, NY (John E. Higgins, Nixon Peabody, LLP, Albany, NY, on the brief), for *Defendants-Appellants-Cross-Appellees*.

JOHN B. DuCHARME, Berger & DuCharme, LLP, Clifton Park, NY, for *Plaintiffs-Appellees-Cross-Appellants*.

Laurie A. McCann, Daniel B. Kohrman, AARP Foundation Litigation; Melvin Radowitz, AARP, Washington, DC, *for Amicus Curiae AARP in support of Plaintiffs*.

Stephen A. Bokat, Robin S. Conrad, Ellen Dunham Bryant, National Chamber Litigation Center, Washington, DC; Mark S. Dichter, Morgan, Lewis & Bockius LLP, Philadelphia, PA; Grace E. Speights, Anne M. Brafford, Jonathan C. Fritts, Morgan, Lewis & Bockius, LLP, Washington, DC, *for Amicus Curiae Chamber of Commerce of the United States of America in Support of Defendants.*

Nicholas M. Inzeo, Acting Deputy General Counsel, Philip B. Sklover, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Barbara L. Sloan, Attorney, Equal Employment Opportunity Commission, Washington, DC, *for Amicus Curiae Equal Employment Opportunity Commission in support of Plaintiffs.*

Jennifer Bosco, National Employment Lawyers Association, San Francisco, CA; Cathy Ventrell-Monsees, Chevy Chase, MD, *for Amicus Curiae National Employment Lawyers Association in support of Plaintiffs.*

POOLER, *Circuit Judge*:

Plaintiffs are all former employees of defendant Knolls Atomic Power Laboratories ("KAPL") who lost their jobs in

the course of an involuntary reduction in force ("IRIF"). As all of the plaintiffs are over forty, they are protected under the Age Discrimination in Employment Act ("ADEA"). *See* 29 U.S.C. § 631(a). They sued KAPL, its president, John Freeh, and its parent company, Lockheed Martin Corporation, alleging age discrimination under both federal and state law. In particular, they claimed that KAPL designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees. The jury rejected plaintiff's intentional discrimination claim but found that a facially neutral policy had a discriminatory impact on older employees and that KAPL could have accomplished its legitimate business goals by a method that was not discriminatory in its impact. The jury also found that defendants KAPL and Lockheed Martin acted willfully.

On appeal, KAPL attacks the verdict on several grounds. First, it urges that we reexamine and reject prior holdings of this court allowing an age discrimination claimant to proceed on a disparate impact theory. KAPL also contends that New York courts do not allow a disparate impact claim. Assuming the availability of a disparate impact claim to age discrimination plaintiffs, KAPL attacks the sufficiency of the evidence to support the disparate impact verdict because (a) the same practice—the IRIF—cannot be the basis for both a disparate treatment and a disparate impact claim; (b) plaintiffs did not sufficiently specify the contested employment practice; (c) plaintiffs' statistical evidence was inadequate and a portion of it was improperly admitted; (d) plaintiffs offered no evidence of an equally effective and no more costly alternative to the IRIF procedures; and (e) there was no competent evidence of willfulness. Finally, KAPL urges that portions of the damages award must be reduced or entirely set aside.

We affirm the verdict, holding that the arguments not waived by KAPL lack merit.

BACKGROUND

Relevant Facts

Our description of the background for this appeal is drawn from the trial testimony and exhibits as well as stipulated facts—viewed in light of the applicable standards of review, the limited number of issues on appeal, and questions concerning KAPL's preservation of certain issues. Because the jury ruled in KAPL's favor on the disparate treatment claim and plaintiffs question this verdict only in the alternative, we do not discuss facts relevant to it. Because the standard of review for denial of judgment as a matter of law ("JMOL") requires us to credit the testimony that favors plaintiffs and does not allow us to reverse the jury's verdict based on evidence the jury could have rejected, we do not set out, except in general terms, defendants' refutation of plaintiffs' witnesses' testimony. *See Tolbert v. Queens Coll.*, 242 F.3d 58, 70 (2d Cir. 2001). And, because of the waiver issues, we address at some length the arguments defendants made in their motions for summary judgment and JMOL.

KAPL manages and operates the Knolls Atomic Power Laboratory, a research and development facility owned by the United States, under a contract with the Department of Energy ("DOE"). Its work is jointly funded by DOE and the United States Navy's Nuclear Propulsion Program (collectively, "NR"), and consists of designing advanced nuclear propulsion systems, providing training to sailors to operate them, and overseeing maintenance, repair, refueling and decommissioning.

NR pays KAPL on a cost-plus basis for the work it performs. To control costs, NR, in consultation with KAPL, sets an annual staffing limit for the lab.[1] This limit is

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[1] "Staffing level" is not an exact term. The agreement between NR and KAPL instead provided for a fixed number of "manyears." If the same workers remained at the same jobs for the entire year,

designed to adequately staff the work KAPL contracts to perform for NR. KAPL must stay within this ceiling.

For fiscal year 1996, NR set KAPL's staffing level at 108 jobs below the previous year's level. In addition, NR assigned KAPL new work that KAPL alleges required it to make thirty-five new hires. In combination, the staffing level reduction and the need for new hires required KAPL to eliminate 143 existing jobs. Thus, KAPL designed and implemented a Workforce Reduction Plan ("WRP") providing the following methods to both pare the existing work force and acquire employees with unmet critical skills: (1) a voluntary separation plan ("VSP") offering a $20,000 separation incentive for employees with at least twenty years of service; (2) transfers where possible to accommodate hiring needs; (3) retraining to allow existing employees to perform new skills; (4) an involuntary reduction in force; and (5) new hiring only when necessary for critical skills. KAPL consistently estimated that the average voluntary separation would cost it less than the average involuntary termination.

Prior to issuing the final workforce reduction plan, KAPL considered allowing all employees to participate in the VSP. KAPL's human resources manager, Donald Burek, estimated that between 200 and 250 people would have elected to participate in such a plan. According to Freeh, KAPL rejected the idea of a VSP open to all employees except those with critical skills because, after speaking with other employers who had implemented such plans, he was

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the staffing level would be identical to the number of manyears. However, because workers do not remain at the same jobs throughout the year and because the IRIF took some time to implement, KAPL had to eliminate more employees than it would have eliminated if it had simply been required to reduce its workforce to a certain level by a certain date. We nevertheless use the more easily comprehensible terms, "staffing levels" and "number of employees" because the distinctions between those terms and "manyears" do not affect our analysis.

concerned that denying the severance payment to persons with critical skills would cause a morale problem.

KAPL warned its employees that it could disapprove a VSP application on the basis of business needs. The company, in fact, denied at least one application because the employee had skills critical to the company.

By November 16, 1995, KAPL had completed the VSP process and allowed 107 employees to participate. The company then began to implement the IRIF component of its overall plan to reduce the workforce. Before the IRIF started, Burek made several different projections concerning its impact on the workforce by age group. The estimates of the participation by workers over forty in the IRIF ranged from 70% on the high end to 30% on the low end.

Initially, managers throughout KAPL determined which sections were facing an increased workload and which skills were excess. The particular sections, subsections, and units that would be impacted by the IRIF were determined by their staffing budgets. That is, if a section was over budget, it undertook an IRIF. If it was under budget, there was no IRIF even if workers in the section had skills that had been determined to be "excess."

Over-budget managers were instructed to select employees for the IRIF by listing "all employees in [their] group[s] on [a] matrix"; ranking them between zero and ten for performance, flexibility, and criticality of their skills; and giving up to ten points for company service. Managers were to rate performance based on an average of the two most recent performance appraisals. The tests for making a flexibility determination were whether the employee's "documented skills [could] be used in other assignments that [would] add value to current or future Lab work" and whether the employee was "retrainable for other Lab assignments." Critical skills were those skills that were critical to continuing work in the Lab as a whole. In addition, KAPL directed managers to consider whether the "individual's skill [was] a

key technical resource for the NR program" and whether "the skill [was] readily accessible within the Lab or generally available from the external market." An employee would receive two points for service if she had between two and five years of service, four points for six to ten years of service, six points for eleven to fifteen years, eight points for sixteen to twenty years of service, and ten points for service above twenty years.

The guidelines further instructed the managers to identify for layoff the lowest ranked employees until its staffing was reduced to the required level. The managers were then to perform an adverse impact analysis to "determine whether [their] planned actions might have a disparate impact on a protected class of employees." For minorities and females, the guidelines suggested using the EEOC's four-fifths rule to determine whether an adverse impact existed. In explaining the rule, KAPL noted that "if the selection rate for a protected group is greater than 120% of the rate for the total population a serious discrepancy exists." The instructions further provided: "A similar analysis should be performed to assure that we are not violating the Age Discrimination in Employment Act ('ADEA')."

A review board was to assess the manager's selections "to assure adher[e]nce to downsizing principles as well as minimal impact on the business and employees." Finally, KAPL's general manager, John Freeh, and its chief counsel, Richard Correa, were to review the final IRIF selections and the impact analyses.

The managers placed 245 of a total of approximately 2,063 exempt employees on the matrices and selected thirty-one for layoff. Thirty of the terminated employees were over forty.

After managers submitted the names of employees identified for layoff, KAPL performed an adverse impact analysis, but not the four-fifths analysis described in the Guidelines. Instead, Linda Geiszler, a human resources

representative, compared the average age of the workforce before the IRIF with the average age of the workforce after the IRIF. Geiszler neither received instruction on how to conduct such an analysis from senior human resources personnel nor read any books or articles on how to do it. Although the review board considered the accuracy of managers' ratings, it did not look at age discrimination issues.

Correa testified that although Freeh did not ask him to investigate why older workers were disproportionately represented in the layoffs, he did complete a legal review of the IRIF process. His paralegal checked the math on the matrices, and he spoke with human resource representatives and some, but not all, managers "to see if there was a legitimate, nondiscriminatory reason for the selections." When he did speak with managers, he questioned them only about the lowest four or five individuals on each matrix.

Although Correa was familiar with the ADEA, he explained that he did not look at who was placed on the matrices because "[w]hat was important was [that] the RIF decisions were properly made, they were legitimate decisions." At one point, Correa testified that "an impact analysis is only required for race and sex." However, he later grudgingly acknowledged that "[r]ight now" disparate impact analysis was a viable age-discrimination theory in the Second Circuit. He further claimed that there was "no way to determine whether [Geiszler's analysis was] appropriate or not, since there's no guidance on it." Correa concluded as a result of his review that the IRIF did not violate the ADEA.

Dr. Janice Madden, a qualified expert in the area of employment discrimination and an experienced statistician who testified for the plaintiffs, analyzed the impact of several aspects of the IRIF on older employees. First, she compared the age composition of the pre-IRIF exempt work-force to the persons actually laid off. The pre-layoff exempt population consisted of approximately 40% workers under the age of forty and approximately 60% over forty. However, workers

over forty constituted approximately ninety-eight percent of the laid-off workers. Madden estimated that the probability of this differential occurring by chance was approximately one in 348,000. Looking at the IRIF section by section, Madden estimated the probability that thirty employees over forty would be laid off by chance as one in 6,639. Madden also testified that younger workers were less likely to get on the matrices in the first place. Of the 245 workers on the matrices, 179 were over forty. The odds of selecting thirty workers over forty from the 245 workers on the matrices were approximately one in 1,260.

Madden also testified that the matrices with the highest percentages of workers over forty resulted in the highest percentage of layoffs. However, even assuming that the matrices were drawn up properly, the odds of thirty older workers being laid off from these matrices were approximately one in seventy-three. Each of the disparities Madden found was statistically significant. She explained that a disparity is statistically significant if "the probability that something could happen by chance is less than 5 percent" and that each of the disparate outcomes she studied had a much lower than five percent chance of occurring randomly with the closest one being less than one percent.

Madden also considered each of the four criteria on the matrix and "found ... that the years of service score had no [e]ffect. The performance score actually had very little [e]ffect. ... [T]he two scores that were most responsible statistically for selecting who was RIFed among those individuals on the matrices [were] criticality and flexibility." She also concluded that excess skills could not explain the age differential. Madden concluded that the procedures set up for review of the individual managers' decisions "did not offer adequate protections to keep the prejudices of managers from influencing the outcome."

Finally, Madden criticized Geiszler's analysis of adverse impact, stating that to do a proper adverse impact analysis, a statistician must compare the age composition of the pool from which the laid off employees were selected with the age composition of the group selected for layoff. Because KAPL's exempt workforce exceeded 2,000 persons, Madden testified that "you literally could go from top to bottom of 31 people picking the oldest, you know, just blatantly and you wouldn't affect the average age composition in any meaningful way."

District Court Proceedings

In January 1997, appellants filed two separate age discrimination lawsuits in the United States District Court for the Northern District of New York. These two lawsuits, which made claims under the ADEA and New York's Human Rights Law, were consolidated. Plaintiffs alleged both disparate treatment in the planning and implementation of the IRIF and disparate impact from the IRIF. Claiming that defendants' violations of the ADEA were willful, plaintiffs demanded liquidated damages pursuant to 29 U.S.C. § 626(b). They also sought damages for emotional suffering under the Human Rights Law, front pay, back pay, and attorney's fees.

On July 7, 1999, after discovery, defendants moved for summary judgment dismissing all of plaintiffs' claims. As relevant to this appeal, they argued that the disparate impact claim should be dismissed because (1) a disparate impact claim is not cognizable under the ADEA, (2) plaintiffs failed to identify a facially neutral policy or practice; (3) plaintiffs did not establish that the design of the IRIF caused the disparate impact on older workers because plaintiffs' expert failed to perform a regression analysis to rule out other causes; and (4) plaintiffs' disparate impact claim was nothing "more than an ill-disguised disparate treatment claim" for which plaintiffs must prove discriminatory intent. To support their argument on the last point, KAPL cited *Maresco v.*

Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992) for the proposition that a disparate impact claim must be dismissed where the alleged "facially neutral employment practice coalesces with the discharge which [the plaintiff] claims to have constituted disparate treatment." The district court (Lawrence E. Kahn, *Judge*) denied defendants' motion without opinion.

The parties consented to a jury trial before Magistrate Judge David Homer, the liability portion of which began June 20, 2000. At the close of plaintiffs' proof, defendants moved for judgment as a matter of law. With respect to the disparate impact claim, defense counsel argued that Dr. Madden's testimony was defective because she failed to conduct a regression analysis to rule out factors other than age, including criticality, flexibility and performance. Because Madden purportedly did not perform a regression analysis, counsel argued that plaintiffs had not shown the policy caused the disproportionate number of layoffs of older employees.[2]

Plaintiffs' counsel identified the challenged practice as both "the overall selection process of the people to be placed on the matrices and what's on the matrices, the scoring of those people" and "each element within the overall practice." Counsel also argued that the statistical disparity itself was sufficient to demonstrate causation. As alternative practices to the IRIF, plaintiffs' counsel suggested (1) opening the VSP to the entire workforce except those with critical skills and (2) a hiring freeze.

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[2] This argument is the only claim defendants made concerning the disparate impact theory. However, they also argued with respect to pattern and practice intentional discrimination that plaintiffs failed to submit acceptable proof of an alternative practice that would have met defendants' business goals and thus shown pretext.

In rebuttal, defense counsel criticized plaintiffs' reliance on individual elements of the IRIF, arguing that this reliance was "in fact, a treatment case sort of masquerading as an impact case." Defense counsel also argued that plaintiffs could not rely on the IRIF as a whole because they had not proven it was incapable of separation for analysis.

Judge Homer denied defendants' motion. Before the case was submitted to the jury, defendants renewed their Rule 50(b) motion. Again, defense counsel argued that plaintiffs' case failed to the extent that they relied on the overall IRIF because plaintiffs did not show that the IRIF was incapable of separation for analysis. Counsel also argued once more that Dr. Madden did not establish causation. Finally, counsel contended that plaintiffs had not met their burden of showing an equally effective alternative to the IRIF. Judge Homer denied the motion.

On July 26, 2000, the jury returned a verdict in defendants' favor on the disparate treatment counts. However, the jury also found that plaintiffs had "proven that a specific employment practice of the defendants . . . although non-discriminatory on its face, had an adverse impact on the plaintiffs because of their ages"; that defendants failed to "articulate[] a business justification for selecting the plaintiffs for termination"; that plaintiffs had proven "that an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals as the method actually followed by the defendants" and that defendants acted willfully.

Prior to the beginning of the damages phase of the trial, eight of the plaintiffs settled with the defendants. The jury awarded the remaining plaintiffs damages ranging from approximately $69,000 to over $1.1 million.

After the damages phase, defendants renewed their motion for JMOL. On liability, they contested the sufficiency of the evidence on the grounds that (1) plaintiffs impermissibly relied on the overall selection process and

(2) plaintiffs' expert testimony was inadequate because she did not identify the correct population or rule out factors other than age as the cause of the disproportionate number of protected employees selected for layoff. Defendants also argued that there was a legally insufficient basis for the jury's findings that (1) defendants failed to articulate a business justification; (2) plaintiffs proved an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals; and (3) defendants acted willfully.

On damages, KAPL contended that there was no evidence to support the front pay award for seven plaintiffs or the back pay awards to ten plaintiffs. Defendants also attacked all the prospective mental anguish awards and sought reduction of awards for past suffering to between $5,000 and $30,000.

KAPL alternatively moved for a new trial pursuant to Federal Rule of Civil Procedure 59, contending that the verdict was against the weight of the evidence and that the court's admission of Madden's testimony—particularly her testimony on the regression analyses—was prejudicial error. KAPL also sought a new trial or remittitur on some of the damages issues.

In a published opinion, Judge Homer denied KAPL's motion, with the sole exception of its request for remittitur on mental anguish damages. *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193, 245 (N.D.N.Y. 2002). The judge noted preliminarily that "[a]lthough courts of appeals are divided over the viability of the disparate impact theory under the ADEA, this theory of proof remains available in the Second Circuit." *Id.* at 206. He then addressed KAPL's various claims concerning the disparate impact verdict. He held that the plaintiffs' prima facie case was sufficient, finding that (1) in this case, the entire IRIF could serve as a facially neutral employment policy because Madden's testimony established that "no particular factor and no

particular criterion caused the disparate impact on older employees"; *id.* at 208; (2) either the entire exempt work force or the exempt employees actually placed on the matrices properly could have been considered by the jury as the correct population for purposes of comparison to the plaintiffs; (3) Madden's results demonstrated statistical significance, *id.* at 210-11; and (4) Madden's testimony concerning her regression analyses was properly admitted because KAPL opened the door and, in any event, it was not prejudicial, *id.* at 211-12.

Judge Homer agreed with defendants that the jury erroneously found that KAPL had not offered a legitimate business justification. *Id.* at 213. However, the "erroneous finding [did] not merit judgment as a matter of law or a new trial" because the jury also found that plaintiffs offered proof of alternative practices that would be equally effective and no more costly than the IRIF. *Id.* at 213-14. The judge also held that the jury permissibly could have found that either a hiring freeze or an extension of the VSP would have permitted KAPL to stay within its staffing budget and retain critical skills at less cost than the IRIF. *Id.* at 215.

KAPL had argued that the willfulness verdict must be set aside both because it was inconsistent with the disparate treatment verdict and because it was unsupported by the evidence. Judge Homer rejected the inconsistency challenge based on the different mens rea standards applicable to disparate treatment and willfulness. He sustained the willfulness verdict based on (1) KAPL's awareness that the ADEA prohibited employment practices that disparately impacted older employees; (2) defendants' knowledge that implementation of the IRIF would result in a disproportionate impact on older employees and their failure to take "meaningful steps to avoid or mitigate that impact"; (3) KAPL's use of a statistical measure for disparate impact that it knew "was incapable of identifying any disparate

impact on older employees"; and (4) KAPL's post-IRIF hiring of younger employees. *Id.* at 215-16.

Primarily on waiver grounds, Judge Homer rejected plaintiffs' contention that disparate impact claims are not actionable under New York's Human Rights Law. *Id.* at 216-17. Alternatively, he held that age discrimination disparate impact claims are actionable under the Human Rights Law. *Id.* at 217.

With respect to damages, the district court rejected all of KAPL's front and back pay challenges but granted relief with respect to some plaintiffs' mental anguish damages. Specifically, if the jury had awarded a plaintiff who had not offered evidence of treatment or of physical sequelae more than $125,000 for mental anguish, the court ordered a new trial unless the plaintiff agreed to accept a damages amount of $125,000. If a plaintiff who had offered proof of treatment or physical impact received more than $175,000 in emotional suffering damages, the court set a remittitur equal to that amount. *Id.* at 221-37.

KAPL filed a timely notice of appeal and plaintiffs a timely notice of cross-appeal. KAPL's principal arguments on appeal are: (1) the ADEA does not support a cause of action based on disparate impact; (2) disparate impact is not cognizable under the Human Rights Law; (3) there is no evidence of disparate impact because (a) plaintiffs failed to isolate and identify a facially neutral employment process; (b) Madden did not demonstrate causation; (c) Madden's post-discovery regression analysis was erroneously admitted and not probative of causation; and (d) plaintiffs did not establish an equally effective and no more costly alternative to the IRIF; (4) there is no evidence of willfulness; (5) the willfulness verdict is inconsistent with the disparate treatment verdict; (6) the emotional damages awards are excessive; and (7) there was no evidence to support the front pay awards to four plaintiffs. Plaintiffs seek to maintain their cross-appeal,

which rests on two asserted evidentiary errors, only if defendants prevail on the principal appeal.

DISCUSSION

I. Principles implicated in our review.

This appeal requires us to apply general principles concerning waiver, stare decisis, and sufficiency of the evidence to support a jury verdict which we will briefly describe.

Plaintiffs argue that KAPL waived several issues by failing to raise them in its motion for JMOL. "[A] party is not entitled to challenge on appeal the sufficiency of the evidence to support the jury's verdict unless it has timely moved in the district court for judgment as a matter of law on that issue." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 164 (2d Cir. 1998). To be timely, the motion must be made before the jury retires so that the non-moving party has an opportunity to remedy any defects in its proof. Id. The motion "must at least identify the specific element that the defendant contends is insufficiently supported." *Id.* (quoting *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 286 (2d Cir. 1998)). We will reach the waived issue if to ignore it would result in manifest injustice. *Id.* We also may correct an error below despite the lack of a timely request in the district court if the issue is purely legal and no fact finding is required. *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000). However, we are much less likely to consider a waived claim "involv[ing] a complex and novel issue of state law." *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 96 (2d Cir. 2000).

Stare decisis, and in particular, our obligation to follow the rulings of prior panels, also plays a role in this case. We are compelled to follow a decision of an earlier panel "unless it has been called into question by an intervening Supreme Court decision or by one of this Court sitting in banc," *United States v. Santiago*, 268 F.3d 151, 154 (2d Cir. 2001), or "unless and until its rationale is overruled, implicitly or

expressly, by the Supreme Court, or this court in banc." *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (per curiam).

Where we reach the merits, we review the district court's denial of JMOL de novo. *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 108 (2d Cir. 2001). The district court, and thus this court, can grant the motion only if after viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of the non-moving party, it finds that there was insufficient evidence to support the verdict. *Tolbert v. Queens Coll.*, 242 F.3d 58, 70 (2d Cir. 2001). Neither the district court nor this court can set aside the jury's credibility findings or find for the movant based on evidence the jury was entitled to discredit. *Id.*

II. Disparate impact under the ADEA.

KAPL contends, based on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) and decisions from other circuits[3] that we should disavow our own precedent holding that policies having a disparate impact on older workers are actionable under the ADEA. According to plaintiffs, this argument was waived by KAPL's failure to raise it before submission to the jury, and is barred by stare decisis. Alternatively they claim that the argument lacks merit.

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[3] See *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 187 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (2004); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696, 697 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1001 (10th Cir. 1996); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir. 1994). *But see Arnett v. California Pub. Emp. Ret. Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1989), *vacated on other grounds*, 528 U.S. 1111 (2000); *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996).

At summary judgment, KAPL acknowledged that this circuit recognizes ADEA disparate impact claims, but, in light of the authority to the contrary, did not concede that an ADEA plaintiff could make a disparate impact claim. Defs.' Mem. Supp. Summ. J. at 10-11. However, in moving for judgment as a matter of law on plaintiffs' disparate impact claim, KAPL did not preserve this argument. Nor was the argument made in KAPL's trial memorandum.

KAPL's failure to move for JMOL based on the unavailabilty of an ADEA disparate impact claim constitutes a waiver. *See, e.g., Kirsch*, 148 F.3d at 169-70. We do not believe the attempted preservation of the issue at the summary judgment stage avoids the procedural default. *Cf. Becker v. Poling Transp. Corp.*, 356 F.3d 381, 391 (2d Cir. 2004) (stating that "the denial of a motion for summary judgment is moot in light of the fact the case has since been tried before a jury"). Nevertheless, the waiver rule is not an absolute one. Here, the district court considered whether a disparate impact claim was tenable under the ADEA notwithstanding KAPL's failure to raise the issue. The district court's decision allows us to proceed with review. *See Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991) (considering the merits of an issue where—despite party's failure to present it to the courts below—those courts decided it). Moreover, the waived issue is easily resolved under existing circuit precedent. Therefore, we will address it.

Stare decisis requires us to hold that the ADEA allows disparate impact claims. As defendants concede, we have repeatedly so held. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358, 364 (2d Cir. 1999); *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (per curiam); *Maresco*, 964 F.2d at 115. We can reject this precedent only if a Supreme Court decision or a decision from this circuit sitting en banc implicitly or explicitly overrules it. *See Santiago*, 268 F.3d at 154; *Sokolowski*, 205 F.3d at 534-35.

In *Hazen Paper*, a disparate treatment case, the Supreme Court held that an employer may lawfully discriminate based on factors closely correlated with age. 507 U.S. at 611-13. KAPL argues that this holding and dicta in *Hazen Paper* suggest that the Supreme Court ultimately will reject ADEA disparate impact claims. While this may be so, the Hazen Paper Court directly stated that it had not resolved the viability of ADEA disparate impact claims.[4] 507 U.S. at 610. The Supreme Court's express statement contradicts any claim that Hazen Paper expressly or implicitly overruled our prior precedent. And, the Supreme Court's dicta do not outweigh prior circuit authority. *See Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir. 1996) (following prior case law allowing an ADEA claim for disparate impact despite its conclusion that dicta in Hazen Paper cast doubt on its viability); *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1225-26 (4th Cir. 1995) ("Although subsequent Supreme Court opinions might be read to cast some doubt upon the constitutionality of the election scheme [we] upheld in [a previous case] . . . we feel bound to treat [that] result . . . as controlling unless and until the Supreme Court provides a much clearer signal to the contrary."); *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 218 (1997) (Cabranes, J., *concurring in part and dissenting in part*) ("we are not free to follow the Supreme Court's strong suggestion in what is concededly dicta"). Of course, the decisions of other circuits do not expressly or implicitly overrule our prior cases. Therefore, we reject KAPL's contention that disparate impact claims are not permissible under the ADEA.

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[4] The Court is likely to resolve this issue next term. On March 29, 2004, it granted certiorari in *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), which held that the disparate impact theory of recovery is not available in age discrimination cases. 124 S. Ct. 1724 (2004).

III. Disparate impact under New York's Human Rights law.

KAPL next argues that we should set aside the jury's Human Rights Law verdict, which is the sole source of plaintiffs' emotional suffering damages. In light of the state age discrimination law's coverage of anyone over the age of eighteen, N.Y. Exec. L. § 296(3-a)(a), and the law in this circuit indicating that ADEA disparate impact plaintiffs must show that a challenged policy has an impact on the entire class, *see Criley*, 119 F.3d at 105, KAPL contends that a disparate impact claim is conceptually impossible. That is, no one employment policy can discriminate against everyone over the age of eighteen. At least one of New York's four intermediate appellate courts has accepted this premise. *See Bohlke v. General Elec. Co.*, 742 N.Y.S.2d 131, 132 (App. Div. 3d Dep't 2002). However, the question has not been addressed by New York's highest court. *See Becker v. City of New York*, 671 N.Y.S.2d 88, 90 (App. Div. 1st Dep't 1998) (noting that "[n]either the United States Supreme Court nor the Court of Appeals has ruled conclusively that disparate impact, as opposed to disparate treatment, constitutes age discrimination").

KAPL concedes that it did not raise this issue until its post-verdict motion but argues that it would constitute manifest injustice to allow the state law verdict to stand. Unlike KAPL's claim that the ADEA does not extend to disparate impact claims, this argument cannot be answered by reference to our decisions. It is also not easily resolvable by construing state law or cases. We cannot easily predict whether New York's Court of Appeals would apply *Criley* to its own statute as the federal and state statutes differ. The federal statute creates a class of older employees who are protected while the state statute prohibits discrimination on account of age against both older and younger workers. *Compare* 29 U.S.C. § 631(a) *with* N.Y. Exec. L. § 296(3-a)(a). The general principle that we construe the

Human Rights law just as we do the ADEA, *see Smith*, 196 F.3d at 363 n.1, has little application to these two quite different statutory provisions. Although *Bohlke* may foreshadow the New York Court of Appeals' resolution of this issue, New York's highest court also could find that a policy having a disparate impact on all persons between, for example, fifty and sixty was actionable even though it had no impact on employees between eighteen and twenty-eight. Because the New York courts should resolve this issue, we decline to address it in the face of KAPL's acknowledged waiver. *See Pulvers*, 210 F.3d at 96.

IV. Adequacy of the proof of disparate impact.

To prove disparate impact, plaintiffs must first identify the specific policy or policies responsible for the disparate impact. *Smith*, 196 F.3d at 367-68. They cannot rely on the company's overall decision making process for a reduction in force unless they "can show that the elements of the employer's decision-making process are not capable of separation for analysis." *Id.* An employer's subjective decision-making process is a proper subject for a disparate impact analysis. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988).

After identifying the relevant policy, the plaintiffs must choose the correct population for statistical analysis. *Smith*, 196 F.3d at 368. In a reduction in force, this population will generally be the population subject to termination, here either KAPL's entire exempt workforce or those exempt employees actually placed on the matrices. *Id.* Plaintiffs' expert then must compare the retention rate of protected employees to that of the non-protected employees. *Id.*

If the comparison of retention rates demonstrates "a statistical disparity . . . sufficiently substantial to raise an inference of causation," defendant must "explain the business necessity of the challenged employment practice." *Id.* at 365. After the defendants meet their burden, plaintiffs may prevail

only "if [they] can show that the employer's proffered explanation was merely a pretext for discrimination." *Id.* They can do this by "show[ing] that another practice would achieve the same result at comparable cost without causing a disparate impact on the protected group." *Id.*

KAPL contends that plaintiffs' proof was deficient in several respects, the first of which is identification of the policy or practice causing the IRIF. They claim that plaintiffs (1) incorrectly focused on the entire IRIF rather than particular aspects of it and (2) impermissibly named the same practice—the design of the IRIF—as the focus of both their disparate impact and disparate treatment claims.

Plaintiffs asserts that KAPL's second argument, which focuses on *Maresco*, has been waived. In *Maresco*, we said:

> Both the disparate treatment and disparate impact theories can be invoked in a given case to establish ADEA liability, since they are simply alternative doctrinal premises for a statutory violation. We do not believe, however, that the disparate impact theory provides any significant analytical contribution in this case.
>
> The facially neutral employment policy that Maresco invokes as the premise for disparate impact liability coalesces with the discharge which he claims to have constituted disparate treatment. Because evidence of the employer's subjective intent to discriminate must be provided to support a claim of disparate treatment, allowing the disparate impact doctrine to be invoked as Maresco proposes would simply provide a means to circumvent the subjective intent requirement in any disparate treatment case. Furthermore, the eight discharges that occurred in connection with the divisional consolidation at issue in this case are unlikely to provide an adequate basis for the sort of statistical

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> analysis frequently employed in disparate impact cases.

964 F.2d at 115 (internal citations and quotation marks omitted). In KAPL's view, *Maresco* means that the same policy or practice can never be the focus of both a disparate impact and a disparate treatment claim. That is, an age discrimination plaintiff cannot argue alternatively that the defendants designed their policy with discriminatory intent and that, regardless of intent, the policy had a discriminatory impact. The preliminary question before us is whether KAPL sufficiently alerted the district court to its argument.

KAPL's motion for summary judgment relied on *Maresco* for the proposition that plaintiffs had made only a disparate treatment claim. KAPL did not explicitly argue that plaintiffs can never maintain a disparate treatment and a disparate impact claim based on the same policy. *See* Defs.' Mem. Supp. Summ. J. at 18-19. However, KAPL did describe *Maresco* as "dismissing a disparate impact claim where the plaintiffs 'facially neutral practice ... coalesces with the discharge which he claims to have constituted disparate treatment.'" Id. at 19. (quoting *Maresco*, 964 F.2d at 115). KAPL's references to *Maresco* at trial and before the jury retired were even more oblique. In its trial memorandum of law, KAPL did not cite *Maresco* and did not claim that disparate impact and disparate treatment claims could never focus on the same policy or practice. Instead, it argued that plaintiffs' disparate impact claim was really a disparate treatment claim in disguise. In its initial Rule 50 motion, KAPL argued:

> Number two, [plaintiffs' counsel] pointed out something also that relates to the [Smith] case. He spoke of the individual elements that also they are complaining about, sort of the individual flexibility, criticality, as applied. This impact case, I think is, in fact, a treatment case sort of masquerading as an impact case. They are complaining about managers

> subjectively applying their judgments to these decisions, which certainly can allow one to, if you've got animus, to inject it into the process. But that's treatment, sir. That's motivation. That's not adverse impact. That's not statistics. And that's all I want to say.

Tr. at 2486.

We believe that the district court would have understood KAPL to have argued that because plaintiffs focused on individual judgments by individual managers, they did not make out a disparate impact claim. KAPL never argued clearly that one policy could not be the focus of both a disparate impact claim and a disparate treatment claim. Thus, we hold that KAPL waived its *Maresco* claim. Had KAPL made its argument clearly, even without citation to *Maresco*, we would consider the *Maresco* argument on the merits. However, whatever the outside boundaries of a party's obligation to specify its objections, at a minimum, the party must have articulated the objection so that a reasonable judge would understand it. KAPL did not meet this standard.

We decline to exercise our discretionary jurisdiction to reach the *Maresco* claim.[5]

We turn now to plaintiffs' purported failure to identify a policy other than the overall IRIF as having a disparate impact. As discussed previously, we held in *Smith* that a plaintiff cannot rely on his employer's overall decision-making process for a reduction in force unless he "can show that the elements of the employer's decision-making process are not capable of separation for analysis." 196 F.3d at 368.

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[5] To reach *Maresco*, we would need to search a large and complex record to determine whether plaintiffs' disparate impact and disparate treatment claims actually do "coalesce." Defendants' failure to preserve means that we would have to do that without the benefit of the district court's insights.

Plaintiff's obligation to identify a specific employment practice causing a disparate impact stems from Watson. In that case, four justices of the Supreme Court said:

> The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially in cases where an employer combines subjective criteria with the use of more standardized rules or tests, the plaintiff is in our vie responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

487 U.S. at 994 (O'Connor, Justice, writing for herself, the Chief Justice, and Justices White and Scalia).

One year later, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court considered plaintiffs' claim that several hiring practices including nepotism, separate hiring channels, rehire preferences, and subjective decision making resulted in a racially imbalanced workforce. *Id.* The Wards Cove court rejected plaintiffs' global approach, requiring instead that they demonstrate that "specific elements of the [employer's] hiring process have a significantly disparate impact on nonwhites." Id. at 658. Thus, although subjective decision making is subject to a disparate impact analysis, it must be shown that it is the subjective elements of the decision-making process that caused the disparate impact.

With these principles in mind, we examine in the light most favorable to plaintiffs, their statistical proof. At the outset, we note that KAPL's IRIF was broken down and analyzed by Dr. Madden as a four-step process, and that the structure of the IRIF lent itself to that analysis; plaintiffs were thus required to "isolate [] and identify [] . . . specific employment practices" allegedly responsible for the IRIF's

lopsided outcome. *Watson*, 487 U.S. at 994. Plaintiffs met this burden. A reasonable juror could have viewed Dr. Madden's testimony as establishing that (1) the procedures used to select employees to be placed on the matrices selected older employees at a disproportionate rate; (2) older employees were selected from the matrices at a rate disproportionate to their numbers on the matrices; (3) of the criteria listed on the matrices, managers' judgments on flexibility and criticality had the greatest impact on the persons selected for layoff; (4) one basic flaw in the IRIF process was the degree of subjective decision making it allowed to individual managers to set flexibility and criticality scores; and (5) another was the failure to audit for that tendency. Thus, the jury could have found that the degree of subjective decision making allowed in the IRIF created the disparity.

But sustaining the jury's causation finding is insufficient to preserve the verdict against KAPL because, as the district court ruled, the lab offered a facially legitimate business justification for the IRIF and its constituent parts: "to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions." *Meacham*, 185 F. Supp. 2d at 213.[6] Unchallenged, KAPL's justification would preclude a finding of disparate impact. However, plaintiffs prevail nonetheless if they demonstrate that KAPL's justifications are a pretext for discrimination by challenging their veracity or by showing "that another practice would achieve the same result at a comparable cost without having a disparate impact on the protected group." *Smith*, 196 F.3d at 365.

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[6] Although it denied KAPL's post-verdict motions, the district court noted that the jury erroneously found that KAPL failed to offer a legitimate business justification for terminating plaintiffs' employment through the IRIF. The error was deemed harmless due to the jury's finding with respect to equally effective alternatives. *Meacham*, 185 F. Supp. 2d at 213-14.

The district court ruled that the jury could have found that the availability of two suitable alternatives—a hiring freeze and a selective expansion of the VSP—exposed KAPL's justification as pretextual. *Meacham*, 185 F. Supp. 2d at 214-15. We affirm this result on different grounds, notwithstanding that Judge Homer's ruling was erroneous. A hiring freeze or an extended VSP might have been cost effective, but they are not alternatives to the specific employment practices plaintiffs identified as discriminatory: unaudited and heavy reliance on subjective assessments of "criticality" and "flexibility." Rather, they are replacements for the IRIF itself, which was (and is) a personnel decision justified by KAPL's business objectives. *See, e.g., Atonio v. Wards Cove Packing Co., Inc.*, 10 F.3d 1485, 1502-03 (9th Cir. 1993).

Faced with the need to cut its workforce and simultaneously to retain employees with critical skills, KAPL undertook a multi-step workforce reduction plan that included a VSP, transfers, retraining, a limitation on new hiring to candidates with critical skills, and—finally—the IRIF. Employers are free to decide that layoffs are necessary; and "criticality" and "flexibility" may be appropriate criteria to use in making a termination decision. But if a particular criterion is subjective (as "flexibility" and "criticality" are, and if (as here) evidence shows that (i) the subjectivity disproportionately impacted older employees; (ii) the employer observed that the disproportion was gross and obvious; and (iii) the employer did nothing to audit or validate the results, then an employer may be liable for discrimination if equally effective alternatives to the challenged features of the employment practice are available.

At least one suitable alternative is clear from the record: KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias. For

instance, KAPL's in-house counsel, Richard Correa, spoke to certain managers about certain scores, but his review was far from systematic and appears to have consisted primarily of having a paralegal check the managers' math. A sample of the factors considered in scoring flexibility shows that the criterion was imprecise at best.[7] This evidence, combined with Dr. Madden's testimony and KAPL's inadequate response when the criticality and flexibility criteria led to extremely skewed results (see the discussion of willfulness below) could easily have led the jury to conclude that KAPL could have made simple adjustments to the criticality and flexibility criteria that would have led to a nondiscriminatory distribution of layoffs.[8]

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[7] According to one set of instructions:

> Flexibility: The individual's flexibility to do other work within KAPL was considered. We considered principally ability to do other work within MDO, but kept in mind ability to do other work around KAPL. Highest ratings went to those with demonstrated previous experience in other assignments. For those without as much broad experience as those getting top values, higher ratings were provided to those who had demonstrated flexibility in different types of work within their assignments. For the population below this, points were provided for demonstrated operative behavior in taking on or being asked to take on work. Lowest ratings went to those who had demonstrated resistance to being flexible to new tasks, or who, despite a flexible attitude were limited in their skills.

[8] The alternative of reworking the challenged criteria is all but self-evident from the record, particularly since company counsel could have asked for a second (perhaps outside) opinion when he received the IRIF's startlingly skewed results. We are satisfied that the alternative was adequately presented to support the result here.

We turn now to KAPL's claim that because Dr. Madden did not rule out other causes, plaintiffs failed to establish that KAPL's facially neutral IRIF policy caused the disparate impact on older workers. This argument misconstrues the role statistics play in a disparate impact analysis. Statistical disparity alone—assuming it is substantial as it was here—raises an inference of causation. *Smith*, 196 F.3d at 365. The Second Circuit cases that KAPL cites for its argument to the contrary are all disparate treatment cases, not disparate impact cases, and (in part because defendants failed to preserve the Maresco issue) are not relevant to this disparate impact case. *See* Appellants' Br. at 47 (citing *Bickerstaff v. Vassar College*, 196 F.3d 435, 445-50 (2d Cir. 1999); *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir. 1999); *Raskin v. Wyatt Co.*, 125 F.3d 55, 60, 68 (2d Cir. 1997)).

KAPL also argues that Madden's testimony concerning regression analyses was erroneously admitted and that it prejudiced KAPL. Madden admitted at her deposition that she had not performed any regression analyses. Armed with this admission, defense counsel sought to undermine her direct testimony by asking whether she had performed any regression analyses. She answered that she had.[9] On redirect, plaintiffs' counsel asked Madden to describe the analyses she had performed. Over KAPL's objections, the court allowed the testimony but provided that KAPL could recall Madden at a later time and at plaintiffs' expense. Madden then testified that she had found that older workers' performance skills declined disproportionately to those of younger workers between evaluations conducted in 1991 and evaluations conducted in 1995. She also testified that flexibility and criticality scores were much better predictors of who would be laid off than were performance and years of service scores.

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[9] She performed these analyses between the deposition and her trial testimony.

We review the district court's evidentiary rulings for abuse of discretion, *see Wolak v. Spucci*, 217 F.3d 157, 161 (2d Cir. 2000), and we reverse only if refusal to do so is "inconsistent with substantial justice," Fed. R. Civ. P. 61. Thus, although Federal Rule of Civil Procedure 26(a)(2) requires disclosure and supplementation as needed of expert reports, any nonprejudicial error the district court may have made does not require reversal. The district court gave KAPL a chance to remediate any prejudice by recalling Madden at plaintiffs' expense. Although KAPL chose not to recall Madden, it did offer extensive testimony from its own expert to rebut Madden's conclusions. Therefore, plaintiffs gained no unfair advantage from their partial failure to disclose.

Having addressed KAPL's objections to the jury's disparate impact verdict, we affirm it.

V. The willfulness verdict.

An employee is entitled to liquidated damages equal to his back pay for willful violations of the ADEA. 29 U.S.C. §§ 216(b), 626(b). KAPL challenges the jury's willfulness verdict arguing that (1) it is inconsistent with the jury's finding that KAPL did not intentionally discriminate and (2) in light of KAPL's careful IRIF plan, there was no evidence to support the verdict.

There is no inconsistency in the verdicts. Disparate treatment liability requires that the plaintiff employer intend to discriminate on the basis of age, *Cronin v. Aetna Life Ins. Co.* 46 F.3d 196, 204 (2d Cir. 1995), while an ADEA violation is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," *Hazen Paper*, 507 U.S. at 614. Given these different standards, a jury could reasonably find both that KAPL did not intentionally discriminate on the basis of age and that it showed reckless disregard for the impact of its IRIF policy on older employees.

We also hold that the jury had sufficient proof of reckless disregard to find willfulness. KAPL's counsel knew that this circuit recognizes a claim for disparate impact under the ADEA. In addition, the IRIF guidelines instructed managers to test for age discrimination by use of the 4/5 test. Geiszler, however, did not use the 4/5 test. Instead, she compared the average age of KAPL's 2000-plus employees before and after the IRIF and found no significant difference. Not only did Madden testify to this method's gross inadequacy, but it is also inconsistent with the methodology we have approved. *See Smith*, 196 F.3d at 365-66 (approving as methods for judging disparate impact, the four-fifths test and the statistical approach used by Madden).

KAPL knew that its IRIF had affected a disproportionate number of older employees. A reasonable jury could have found that KAPL management's failure to challenge Geiszler's patently inadequate approach evinced a desire not to know that the overwhelming—and overwhelmingly disparate—impact of the IRIF was on older workers, and that KAPL's failure to modify its procedures in the face of this disparity reflected a reckless disregard for whether it had violated the ADEA by implementing a policy with such an impact.

Seen in the light most favorable to plaintiffs, the proof demonstrated that KAPL's procedures for guarding against disparate impact age discrimination were inadequate. Some managers who selected employees for termination testified that they received no training on avoiding age discrimination in the IRIF. The review board also received no training on age discrimination and did not monitor for age discrimination. And, as we have outlined, Correa's review was quite limited. The jury reasonably could have found that this proof, too, supported a conclusion that KAPL managers acted in reckless disregard of their obligations under the ADEA.

Because there was sufficient proof of reckless disregard to enable a jury to find that KAPL acted willfully and there is

no inconsistency between the disparate treatment and willfulness verdicts, we affirm the jury's verdict on willfulness.

VI. Damages.

A. Mental anguish.

Where plaintiffs offered no proof other than testimony establishing shock, nightmares, sleeplessness, humiliation, and other subjective distress, Judge Homer limited their mental anguish damages to $125,000. The judge limited damages where either physical sequelae or professional treatment was established to $175,000. In some instances, these caps significantly reduced the amounts the jury had awarded. KAPL contends, however, that all awards should have been reduced to between $5,000 and $30,000. In KAPL's view, the damages must be reduced to this level because (1) the district court failed to address the damages in light of KAPL's good faith and (2) plaintiffs' claims do not rise above garden variety emotional distress claims for which New York courts traditionally uphold awards of no more than $30,000.

In determining whether the mental anguish damages, which stem exclusively from plaintiffs' state law claim, should have been further reduced, we must use New York standards. *Gasperini v. Center for Humanities*, 518 U.S. 415, 431 (1996). New York law provides that jury verdicts may be set aside and new trials ordered where the jury's award "deviates materially from what would be reasonable compensation." N.Y. C.P.L.R. § 5501(c). Mental anguish damages must also be "reasonably related to the discriminatory conduct" of the defendant. *In re New York City Transit Auth.*, 573 N.Y.S.2d 49, 54 (NY 1991). The reviewing court looks to "the duration of a complainant's condition, its severity or consequences, any physical manifestations, and any medical treatment." *Id.* at 55. Finally, the reviewing court must determine how the award

compares with others awarded for similar injuries and whether it is supported by evidence before the jury. *Id.*

New York cases vary widely in the amount of damages awarded for mental anguish. Many do reduce awards to $30,000 or below. *See, e.g., In re Buffalo Athletic Club*, 672 N.Y.S.2d 210, 211 (App. Div. 4th Dep't 1998); *In re Manhattan and Bronx Surface Transit Operating Auth.*, 632 N.Y.S.2d 642, 644 (App. Div. 2d Dep't 1995); *In re New York State Office of Mental Retardation and Developmental Disabilities*, 583 N.Y.S.2d 580, 582 (App. Div. 3d Dep't 1992); *In re City of Fulton*, 633 N.Y.S.2d 914, 915 (App. Div. 4th Dep't 1995). However, other cases uphold awards of more than $100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment. *See, e.g., Rio Mar Rest. v NYSDHR*, 704 N.Y.S.2d 230, 231 (App. Div. 1st Dep't 2000); *In re Allender*, 649 N.Y.S.2d 144, 145 (App. Div. 1st Dep't 1996); *Boutique Indus., Inc. v. NYSDHR*, 643 N.Y.S.2d 986, 986 (App. Div. 1st Dep't 1996). For truly egregious conduct with severe and verified results on a complainant's mental and physical health, courts have upheld awards far in excess of the amounts upheld here. *See, e.g., In re New York City Transit Auth.*, 581 N.Y.S.2d 426, 428-29 (App. Div. 2d Dep't 1992). In addition, the passage of time since the cited cases were decided could reasonably support higher verdicts. When confronted with the range of mental anguish verdicts approved under New York law, we do not find the verdicts in this case to deviate substantially from verdicts awarded under similar circumstances.

B. Front Pay.

Finally, KAPL claims that there was no evidence to support the jury's front pay awards for plaintiffs Deborah Bush, who received $70,625.15 for ten years; Bruce Palmatier, who received $13,211.05 for nine years; David Townsend, who received $25,121.50 for twelve years; and Carl Woodman, who received $42,344.21 for twelve and a half years. KAPL contends that the awards are not justified

because plaintiffs have not demonstrated that they continued to make efforts to obtain comparable employment. KAPL also contends that the awards project too far out in the future.

Front pay is available under the ADEA "where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable employment." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984). The employer ordinarily has the burden of demonstrating that suitable employment was available. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998). However, if the employee failed to take reasonable steps to mitigate his damages, the employer need not prove that suitable employment existed and the plaintiff is not entitled to front pay. *Id.* at 54-55. The first issue presented is whether plaintiffs failed to make reasonable efforts to mitigate their damages, thus relieving defendants of the burden to demonstrate the existence of suitable employment.

Each of the plaintiffs obtained employment. Six months after Bush's termination, she found a job as an administrative assistant at a salary lower than she had received at KAPL. She left that job for another job that paid less but gave her better prospects of promotion. By the time of trial, her new job paid her approximately $3,000 less per year than she had been paid at KAPL.

Woodman, who had worked as a specialist in non-destructive testing, was rehired at KAPL as a janitor. Woodman continued to look for jobs in his field. He found a job as a nondestructive tester with another company but continued to look for other opportunities. In early summer 1998, the new company fired him. In November 1998, KAPL rehired him as a nondestructive test inspector, a non-exempt job. He continued to look for a specialist job at KAPL.

Palmatier, who worked as an exempt electrical specialist at the time of the layoffs, returned to KAPL in May 1996 as a non-exempt hourly electrician. With overtime, his wages slightly exceeded the salary he received at the time of layoff.

He did not look for non-union work because layoffs are by seniority in the non-exempt ranks and he believed he would have better protection as a member of the union.

In April or May 1996, Townsend, a former specialist, obtained a job as a health physics technician at a KAPL subcontractor. From that position, he became employed as a janitor at KAPL. Later, he was promoted to the position of radioactive waste processor. Townsend also applied for specialist jobs but was turned down. In February 1998, he took a job at KAPL as a radiation technician and has continued to seek promotion within his unit. However, because of his prior experience, Townsend is now wary of applying for exempt positions.

The district court did not clearly err in finding that plaintiffs made reasonable efforts to mitigate damages and that defendants failed to prove that other, more comparable employment existed. Each plaintiff diligently sought employment and reasonably explained why he or she was unable to or chose not to find more remunerative employment.

The amount of time for which front pay will be awarded is committed to the district court's discretion. *See, e.g., Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1182 (2d Cir. 1996). KAPL wholly fails to demonstrate why the district court abused its discretion in choosing time periods between nine and twelve and a half years as the front pay period for plaintiffs who already had taken substantial steps to mitigate their damages. Therefore, we affirm the front pay awards.

VII. Cross-appeal.

As noted previously, plaintiffs request affirmative relief on their cross-appeal only if the defendants prevail on their appeal. Because we have affirmed the judgment of the district court, we have no need to address the issues raised on the cross-appeal.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
N.D. NEW YORK.

Feb. 13, 2002

Nos. 97-CV-12 (DRH), 97-CV-45 (DRH)

Clifford B. MEACHAM; Thedrick L. Eighmie; and Allen G. Sweet, all individually and on behalf of all other persons similarly situated; and

James R. Quinn, PhD; Deborah L. Bush; Raymond E. Adams; Wallace Arnold; William F. Chabot; Allen E. Cromer; Paul M. Gundersen; Clifford J. Levendusky; Bruce E. Palmatier; Neil R. Pareene; William C. Reynheer; John K. Stannard; David W. Townsend; and Carl T. Woodman,

Plaintiffs,

v.

KNOLLS ATOMIC POWER LABORATORY, aka KAPL, Inc.; Lockheed Martin, Inc.; and John J. Freeh, individually and as an employee of KAPL and Lockheed Martin,

Defendants.

James R. Quinn, PhD,

Plaintiff,

v.

Knolls Atomic Power Laboratory, Inc., aka Kapl, Inc.; Lockheed Martin, Inc.; and John J. Freeh, individually and as an employee of KAPL and Lockheed Martin,

Defendants.

Berger & DuCharme, LLP (John B. DuCharme, Joseph C. Berger, of counsel), Clifton Park, NY, *for Plaintiffs*.

Epstein Becker & Green, P.C. (Michael R. Zeller, Alesia J. Kantor, of counsel), New York City, Nixon Peabody LLP (John E. Higgins, of counsel), Albany, NY, *for Defendants*.

MEMORANDUM-DECISION AND ORDER

HOMER, United States Magistrate Judge.

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I. Introduction

The twenty-six plaintiffs, all over age forty, were employed by defendant Knolls Atomic Power Laboratory, Inc. ("KAPL") until 1996 when their employment was terminated in an involuntary reduction-in-force (IRIF). Plaintiffs then commenced this class action[10] against KAPL, Lockheed Martin, Inc., KAPL's parent company, and John J. Freeh ("Freeh"), KAPL's President and General Manager, alleging that their terminations violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the New York Human Rights Law (HRL), N.Y. Exec. Law § 290 *et seq.* (McKinney 2001).[11] Plaintiffs allege

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[10] Two additional employees, Ronald G. Butler, Sr. and Janice M. Polsinelle, were members of the class which brought this action. However, the jury found in favor of the defendants on their claims.

[11] An "opt in" class action may be maintained under the ADEA in accordance with section 16(b) of the Fair Labor Standards Act, see 29 U.S.C. § 626(b) (incorporating 29 U.S.C. §

that the violations resulted from both disparate treatment and disparate impact. Following trial, a jury returned verdicts in favor of the plaintiffs on their disparate impact theory, in favor of defendants on the disparate treatment theory, and awarded damages totaling $5,077,285.33. Judgment was entered on the verdicts. Am. J. (Docket No. 133).

Presently pending are (1) defendants' motion for judgment as a matter of law, a new trial and remittitur (Docket No. 137); (2) plaintiffs' motion for prejudgment interest, postjudgment interest and an upward adjustment of damages for increased taxes (Docket No. 138); and (3) plaintiffs' motion for attorneys' fees and costs (Docket No. 197). For the reasons which follow, defendants' motion for judgment as a matter of law is denied and their motion for a new trial and remittitur is granted in part and denied in part. Plaintiffs' motion for prejudgment interest is granted in part and denied in part, their motion for postjudgment interest is granted and their motion for an upward adjustment of damages for increased taxes is denied. Finally, plaintiffs' motion for attorneys' fees and costs is granted.

II. Background

A. The IRIF

KAPL operates a laboratory to design, build and test prototype naval nuclear reactors and to train United States Navy personnel in their operation and maintenance. KAPL employs approximately 2,700 individuals principally at sites in Niskayuna and West Milton, New York, both within forty miles of Albany. KAPL operates the laboratory under a "cost-plus" contract between the United States Department of Energy (DOE) and Lockheed Martin by which KAPL receives reimbursement for expenses it incurs plus a percentage of those expenses. The contract is overseen by DOE's Schenectady Naval Reactors Office (SNR).

216(b)); *Pandis v. Sikorsky Aircraft Div.*, 431 F.Supp. 793, 796 (D.Conn.1977).

The twenty-six prevailing plaintiffs were employed in exempt, or salaried, positions in various of KAPL's sixteen sections.[12] The sixteen sections were headed by managers who reported directly to Freeh. Each section was also subdivided into sections headed by subsection managers. Certain subsections were further subdivided into units headed by unit managers.

In March 1994, KAPL began formulating a plan to reduce its workforce by approximately 140 positions in accordance with budget projections coordinated between KAPL and SNR. KAPL conceived and adopted a "Workforce Adjustment Plan" (WAP) to achieve the desired reduction in two stages. The first was the "Voluntary Separation Plan" (VSP) by which KAPL offered early retirement to employees with at least twenty years of service in return for the payment of $20,000. The second was the IRIF. In the Fall of 1995, KAPL offered the VSP to its employees. Ultimately, 107 employees applied and were approved for the VSP.

In November 1995, KAPL proceeded with the IRIF.[13] First, KAPL identified the positions within the sixteen sections which were to be eliminated. This "excess skills analysis" sought to determine those positions which KAPL could terminate with the least adverse effect on KAPL's operations. These included, for example, specialized positions in reduced demand. After the employees in those excess positions were identified, the section, subsection and unit managers were directed to evaluate the individuals in those positions by a prescribed process which resulted in the assignment of a numerical score for each employee subject to the IRIF.

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[12] Butler and Polsinelle, the two nonprevailing plaintiffs, were employed in non-exempt, or hourly, positions.

[13] At the same time, KAPL was recruiting and hiring thirty-five new exempt employees, virtually all of whom were under forty years old.

First, the managers assigned scores of from zero to ten points to each such employee in four categories: length of service, work performance, criticality to KAPL's operations, and the flexibility of their talents. For length of service, each employee subject to the IRIF was given one point for every two years of service to a maximum of ten points.[14] For work performance the subject employees were assigned scores based on their previous two performance evaluations.[15] For criticality and flexibility, subject employees were assigned ratings points in each category by their managers.

Second, subject employees were then placed on matrices grouped by category of excess skill and were ranked according to their numerical scores. The employees with the lowest scores on the matrices were selected for the IRIF.[16] KAPL made efforts to place these employees in other vacant positions within KAPL before final decisions were made. On December 6, 1995, KAPL served notices on thirty-one exempt employees and five non-exempt employees that their employment was terminated in the IRIF effective January 12, 1996.[17] Because of KAPL's security concerns, terminated employees were given three hours after receiving their notice to pack their personal belongings and were then escorted off the premises.

At the time of the IRIF, KAPL employed 2,063 individuals in exempt positions after the VSP. Of those,

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[14] Employees were credited with service to General Electric Company, the parent company of KAPL prior to Lockheed Martin.

[15] Performance evaluations were required to be done by an employee's manager every twelve to fourteen months.

[16] Where employees on the same matrix were tied, the managers performed "paired comparisons" of those employees in the various categories to break the ties.

[17] Plaintiff Allen E. Cromer was on disability leave on December 6, 1995. The termination of his employment was extended to May 17, 1996 when he was cleared to return to work.

1,203, or fifty-eight percent, were forty years of age or older [hereinafter "older employees"]. Of those, 245 were considered for the IRIF. Of the 245, 179, or seventy-three percent, were older employees. Of the thirty-one exempt employees selected for the IRIF, thirty, or ninety-seven percent, were older employees.[18] The terminated employees received certain benefits, including severance totaling one week of pay for every year of service to a maximum of twenty-six weeks; continuation of benefits for one year; and the free use and services of an employment counseling service outside KAPL.

B. The Trial

Plaintiffs commenced this action on January 6, 1997.[19] Defendants KAPL and Lockheed Martin were named in the ADEA cause of action and all three defendants were named in the HRL cause of action. Plaintiffs alleged two theories of liability under both the ADEA and the HRL-disparate treatment and disparate impact. Compl. (Docket No. 1). Defendants' motion to bifurcate the trial between liability and damages was granted, Docket No. 59, and the trial on liability commenced before a jury on June 20, 2000. On July 26, 2000, the jury returned a verdict finding under plaintiffs' disparate impact theory that the defendants had discriminated against the twenty-six exempt employees and that such discrimination had been willful. The jury found in favor of

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[18] Five non-exempt employees were also selected for the RIF. Three were over forty years of age.

[19] Plaintiff James R. Quinn commenced a separate action on January 10, 1997 alleging the same claims as well as a claim for breach of an employment contract. In the Memorandum-Decision and Order of United States District Judge Lawrence E. Kahn filed March 20, 1998, the defendants' motion to dismiss the contract claim was granted. *Quinn* Docket No. 15. The two actions were consolidated for all other purposes. *Id.; see also Meacham* Docket No. 15.

defendants on plaintiffs' disparate treatment theory of discrimination. Docket No. 86.

Prior to the commencement of the damages phase of the trial, eight plaintiffs[20] settled their claims with defendants. *See* Docket Nos. 111-17 & 121. The trial on damages commenced before the same jury on September 19, 2000. Evidence was presented in four groups of plaintiffs with four or five plaintiffs in each group and with the jury returning a separate verdict for each group. The verdict for the final group was returned on November 22, 2000. The jury's verdicts on damages awarded the remaining eighteen prevailing plaintiffs total damages as follows:

	Total
Plaintiff	**Amount Awarded**
Raymond E. Adams	$ 411,823.13
Wallace Arnold	$ 526,825.81
Deborah L. Bush	$ 246,509.50
William R. Chabot	$ 119,734.85
Allen E. Cromer	$ 109,386.97
Thedrick L. Eighmie	$ 91,445.00
Paul M. Gundersen	$ 160,218.71
Clifford J. Levendusky	$ 190,605.55
Clifford B. Meacham	$ 125,000.00
Bruce E. Palmatier	$ 332,126.09

[20] Frank A. Paxton, Bruce E. Vedder, David J. Kopmeyer, Arthur J. Kaszubski, James S. Chambers, Teofils F. Turlais, Hildreth E. Simmons and Henry Bielawski.

Christine A. Palmer[21]	$ 78,812.50
Neil R. Pareene	$ 283,783.95
James R. Quinn	$ 68,921.04
William C. Reynheer	$1,115,357.58
John K. Stannard	$ 258,189.40
Allen G. Sweet	$ 128,953.46
David W. Townsend	$ 397,482.91
Carl T. Woodman	$ 432,108.88

Docket Nos. 119, 124, 126 & 128. Judgment was entered on the verdicts. Docket No. 133. These motions followed.

III. Defendants' Motion

Defendants move for an order (1) granting judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b), or in the alternative (2) granting a new trial pursuant to Fed.R.Civ.P. 59, or (3) granting remittitur on certain of plaintiffs' damage awards.

A motion for judgment as a matter of law under Rule 50 should be granted when "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the moving] party on that issue." Fed.R.Civ.P. 50(a)(1). The standard under Rule 50 "mirrors" that for a motion for summary judgment under Fed.R.Civ.P. 56. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On a motion under Rule 50, a court must consider all evidence in the record and not simply the evidence favorable to the nonmovant. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149, 120 S.Ct. 2097,

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[21] During the pendency of these motions, plaintiff Christine A. Palmer settled her claims with defendants and her claims have been dismissed. Docket Nos. 208, 209. There thus remain seventeen plaintiffs on these motions.

147 L.Ed.2d 105 (2000); *Tolbert v. Queens Coll.*, 242 F.3d 58, 70 (2d Cir.2001). "In doing so, however, the court must draw all reasonable inference in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 149, 120 S.Ct. 2097 (citations omitted). Thus, in reviewing the entire record, a court should consider only that evidence favorable to the nonmoving party and any evidence supporting the moving party which is uncontradicted and unimpeached. *Id.*

The standard for granting a new trial under Rule 59 is less demanding. "[U]nlike a motion for judgment as a matter of law, a trial judge considering a motion for a new trial is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." *United States v. Landau*, 155 F.3d 93, 104 (2d Cir.1998) (internal quotations and citation omitted); *see also Funk v. F & K Supply, Inc.*, 43 F.Supp.2d 205, 224 (N.D.N.Y.1999) (McAvoy, J.). Thus, " 'a motion for a new trial may be granted even if there is substantial evidence to support the jury's verdict.' " *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 54 (2d Cir.2000) (quoting *Landau*, 155 F.3d at 104). A court should grant a new trial if "convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Caruolo*, 226 F.3d at 54 (internal quotations and citation omitted).[22]

A. Timeliness

A motion for judgment as a matter of law and for a new trial following a jury verdict must both be filed within ten days of the entry of judgment. Fed.R.Civ.P. 50(b), 59(b). The original judgment in this case was filed on December 5, 2000. Docket No. 131.[23] Thus, excluding Saturdays, Sundays and legal holidays as required by Fed.R.Civ.P. 6(a),

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[22] As to the legal standard applicable to defendants' motion for remittitur, see section II(C) *infra*.

[23] An amended judgment was filed on December 11, 2000. Docket No. 133.

defendants' motion was required to be filed on or before December 19, 2000. On December 19, 2000, defendants filed the instant notice of motion and a supporting affidavit. Docket No. 137. In an order filed the same day, defendants were granted until February 1, 2001 to file and serve supplemental pleadings in support of their motion. Docket No. 136. Defendants timely filed a memorandum of law in support of their motion on February 1, 2001. Docket No. 196. As a threshold matter, plaintiffs now contend that defendants' motion is untimely because their memorandum of law was not filed within the ten days required by the rules. Pls. Mem. of Law (Docket No. 203) at 2-6.

The ten day time limit for this motion is jurisdictional and could not be extended. *See Lichtenberg v. Besicorp Group, Inc.*, 204 F.3d 397, 401 (2d Cir.2000) (describing time limit as "uncompromisable"); *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224, 230 (2d Cir.2000); Fed.R.Civ.P. 6(a). If a motion is not filed within the ten day period, the district court is divested of jurisdiction to consider the motion. *See Weissman*, 214 F.3d at 230. There is no dispute that defendants completed the filing and service of their notice of motion and supporting affidavit within the ten day period. Plaintiffs' contention here thus requires a determination of when a motion is deemed filed for purposes of Rules 50 and 59.

Generally, a motion is deemed filed when it is delivered to the Clerk's Office. *See Wight v. Bankamerica Corp.*, 219 F.3d 79, 85 (2d Cir.2000). Defendants' notice of motion and affidavit were delivered to the Clerk's Office and served within the ten day period. Plaintiffs argue that such filing was not effective for purposes of Rules 50 and 59, however, because the papers filed failed to include a memorandum of law as required by N.D.N.Y.L.R. 7.1(a)(1) and 7.1(g). Plaintiffs also argue that allowing defendants to file their memorandum of law six weeks after their notice of motion

was filed circumvents the purpose of the ten day limits in Rules 50 and 59.

Plaintiffs arguments fail for at least two reasons. First, defendants' motion was accepted for filing by the Clerk and the Court on December 19, 2000 and for that reason alone should be deemed filed as of that date. *See Wight,* 219 F.3d at 85 (holding that the district court's treatment of a motion filed under Rule 59 as timely supported the conclusion that the motion timely filed even though supplemental pleadings were filed after the ten day period to cure technical defects in the original pleadings). Second, the requirement in the local rules that a memorandum of law accompany any motion may be excused or delayed if "good cause is shown." N.D.N.Y.L.R. 7.1(b)(3). Here, given the length and complexity of the trial and the fact that a transcript of the trial was not completed until January 9, 2001 (Docket Nos. 143-95), good cause existed for permitting defendants additional time to file and serve their memorandum of law. Thus, the delayed filing of the memorandum of law did not vitiate the timeliness of defendants' motion under the local rules. Moreover, a district court possesses the inherent power to authorize departures from the requirements of its local rules. *See Somlyo v. J. Lu-Rob Enters.,* 932 F.2d 1043, 1048-49 (2d Cir.1991) ("it is the business of the district court to determine whether fairness demands that noncompliance [with local rules] be excused"); *see also Wight,* 219 F.3d at 85-86 (approving the district court's " 'tailor[ing] the Local Rules to best achieve a just outcome.' ") (quoting *Somlyo,* 932 F.2d at 1049).

Accordingly, defendants' motion here was timely filed and plaintiffs' contention to the contrary must be rejected.

B. Liability

A plaintiff may establish violations of the ADEA and the HRL under theories of disparate treatment and disparate impact. *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.,* 964 F.2d 106, 115 (2d Cir.1992); *see also Smith v.*

Xerox Corp., 196 F.3d 358, 363 n. 1 (2d Cir.1999) (holding that claims under the ADEA and the HRL "are analyzed identically"); *Gonzalez v. City of New York*, 135 F.Supp.2d 385, 399, n. 9, 400, n. 11 (E.D.N.Y.2001) (holding that disparate impact age discrimination claim may be asserted under the HRL and analyzed identically to those brought under the ADEA). Disparate treatment requires evidence that an employer intentionally discriminated against a person forty years of age or older while "[d]isparate impact ... results from the use of employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on a protected group and cannot be justified by business necessity." *Maresco*, 964 F.2d at 115 (internal quotation and alteration omitted); *see also District Council 37, AFSCME v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir.1997). Disparate impact age discrimination does not require proof of discriminatory intent. *Smith*, 196 F.3d at 364 (citing *Griggs v. Duke Power Co.*; 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)). Rather, the disparate impact theory addresses employment practices "that are fair in form but discriminatory in impact." *Griggs*, 401 U.S. at 431, 91 S.Ct. 849. Although courts of appeals are divided over the viability of the disparate impact theory under the ADEA, this theory of proof remains available in the Second Circuit. *See Smith*, 196 F.3d at 367 n. 6.

To recover under a disparate impact claim, a plaintiff must first establish a prima facie case "by identifying a specific employment practice which, although facially neutral, has had an adverse impact on her as a member of a protected class." *Smith*, 196 F.3d at 364 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)); *Knighton v. City of Syracuse Fire Dep't*, 145 F.Supp.2d 217, 224 (N.D.N.Y.2001) (Scullin, C.J.); *Gonzalez*, 135 F.Supp.2d at 399; *Hogan v. General Elec. Co.*, 109 F.Supp.2d 99, 104 (N.D.N.Y.2000) (Hurd, J.). The burden then shifts to the employer to offer a business necessity for the challenged employment practice. *Smith*, 196

F.3d at 365; *Hogan v. Metromail,* 167 F.Supp.2d 593, 595 (S.D.N.Y.2001). If an employer offers such a business necessity, the burden then returns to the plaintiff to "show that the employer's proffered reason was merely a pretext for discrimination." *Id.; Knighton,* 145 F. supp.2d at 224. Defendants contend on this motion that plaintiffs failed at each of these steps of their claim and as well failed to establish that the defendants' conduct was willful or that defendants were liable under the HRL.

1. Plaintiffs' Prima Facie Case

Defendants contend that plaintiffs' evidence failed to establish a prima facie case as a matter of law because (a) plaintiffs failed to identify a facially neutral employment practice, (b) the statistical evidence was insufficient, and (c) the testimony of plaintiffs' statistical expert witness was improperly admitted and insufficient. Defs. Mem. of Law at 8-16.

First, however, the issue presented here follows a trial on the merits. "It is well-established that once a [discrimination] case has been fully tried on the merits, the question whether the plaintiff has established a prima facie case is no longer relevant." *Ottaviani v. State Univ. of New York,* 875 F.2d 365, 373 (2d Cir.1989) (citing *Mitchell v. Baldrige,* 759 F.2d 80, 83 (D.C.Cir.1985)) (internal quotations omitted).[24] Thus, "the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination." *Bazemore v. Friday,* 478 U.S. 385, 398, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). Because this case has been fully tried, defendants' motion on this ground is denied since the only cognizable issue at this stage is whether plaintiffs proved discrimination.

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[24] *Ottaviani* was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. However, discrimination cases under Title VII, the ADEA and the HRL are analyzed identically. *See Smith,* 196 F.3d at 362 n. 1.

In the alternative, however, defendants' arguments concerning plaintiffs' prima facie case are considered on their merits.

a. Facially Neutral Employment Practice

Plaintiffs' initial burden under the disparate impact theory required, *inter alia,* that they identify "a specific employment practice which, although facially neutral, has had an adverse impact on" older employees. *Smith,* 196 F.3d at 364; *Gonzalez,* 135 F.Supp.2d at 399. Plaintiffs identified "the implementation of the exempt employee [IRIF] portion of the WAP." Pls. Mem. of Law (Docket No. 203) at 11-13. Defendants contend that this employment practice was insufficiently specific to satisfy plaintiffs' burden.

The requirement that a plaintiff specify the employment practice which he or she alleges caused the discrimination serves to insure that an employer not be held liable for discrimination simply because a result appeared discriminatory numerically. *See Smith,* 196 F.3d at 367-68; *see also Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656-58, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Thus, "a plaintiff generally cannot rely on the overall decision-making process ... [as] a specific employment practice." *Smith,* 196 F.3d at 367.

Plaintiffs contend that because the implementation of the guidelines for the IRIF was a component of defendants' WAP, which included other components such as the VSP, employee retraining and transfers, their specification of the "implementation" of the IRIF satisfied its burden of identifying a specific employment practice. Such identification, however, actually specifies the decision-making process by which exempt employees were selected for the termination of their employment. The implementation identified here by plaintiffs retains all the elements of overall decision-making regarding the IRIF, which itself was comprised of various elements. The fact that defendants' implementation of the IRIF was a subpart of the larger WAP does not of itself render it a "specific"

employment practice sufficient to satisfy plaintiffs' initial burden.

Nevertheless, a general decision-making process such as that identified by plaintiffs here may serve as the specified employment practice "if the plaintiff can show that the elements of the employer's decision-making process are not capable of separation for analysis." *Smith*, 196 F.3d at 368 (citing 42 U.S.C. § 2000e-2(k)(1)(B)(i)). The trial testimony established that exempt employees were selected for the IRIF pursuant to "Salaried Employee Reduction-in-Force Guidelines." Those guidelines established four criteria by which managers were to select exempt employees for the IRIF. Employees considered for the IRIF were given up to ten points in each for: company service, performance, flexibility and criticality. Points were totaled for each exempt employee considered for the IRIF and the exempt employees with the lowest point totals were selected for the IRIF. These guidelines were facially neutral, were followed by all managers in selecting exempt employees for the IRIF, and led directly to the selection of plaintiffs for the IRIF.

The criterion for service was objective on its face, but because it denied credit to employees for any period of employment beyond twenty years, it arguably had a disproportionate impact on employees with lengthy periods of employment with defendants, all of whom were over forty years of age.[25] The remaining three criteria required the application of objective standards in various categories.[26] The

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[25] The most extreme example was presented by plaintiff Clifford B. Meacham. Meacham had been employed by KAPL and General Electric for over forty-three years but received credit under the guidelines for only twenty years of employment.

[26] For example, advanced degrees, training and prior experience were considered for flexibility and criticality.

points assigned for the four criteria were then totaled to determine which employees would be selected for the IRIF.

Thus, various factors were considered for each criterion and the four criteria were considered as a group to determine selection for the IRIF. The evidence adduced by plaintiffs at trial, principally that of KAPL personnel regarding the guidelines and plaintiffs' statistical expert witness, sufficed to establish that no particular factor and no particular criterion caused the disparate impact on older employees. Rather, the evidence established that, as asserted by plaintiffs, such impact resulted from the implementation of the guidelines and that the various factors and criteria, the elements of defendants' decision-making, reasonably were "not capable of separation for analysis." *Smith,* 196 F.3d at 368. Thus, in the circumstances of this case, plaintiffs' identification of the implementation of the guidelines for selecting exempt employees for the IRIF satisfied plaintiffs' initial burden of proof.

b. Sufficiency of Plaintiffs' Statistical Evidence

Defendants next contend that plaintiffs failed to satisfy their initial burden of demonstrating that any statistical disparity against plaintiffs was caused by age discrimination. Defs. Mem. of Law at 11-14. Plaintiffs respond that the statistical evidence offered through their expert witness sufficed to meet this burden. Pls. Mem. of Law at 13-19.

After a plaintiff specifies the employment practice responsible for the adverse impact on older employees, a plaintiff must then demonstrate, generally through statistical data, that the employment practice caused a significant disparity in outcome between older employees and younger employees. *See Smith,* 196 F.3d at 364-65 (citing *Watson,* 487 U.S. at 994-95, 108 S.Ct. 2777). Where a plaintiff relies on a statistical disparity to meet this burden, that disparity "must be sufficiently substantial to raise an inference of causation." *Id.; see also Watson,* 487 U.S. at 994, 108 S.Ct. 2777 (holding that statistical evidence at this stage must be

"of a kind and degree sufficient to" infer discrimination); *Gonzalez*, 135 F.Supp.2d at 399.

No bright line rules have been established to determine the sufficiency of statistical evidence at this stage. *See Ottaviani*, 875 F.2d at 373 ("in accordance with Supreme Court pronouncements, we must reject appellants' suggestion that this court announce a rule of law with respect to what level of statistical significance automatically gives rise to a rebuttable presumption of discrimination."); *see also Smith*, 196 F.3d at 365 ("no bright line rules exist"). However, courts generally require a plaintiff to meet two requirements. First, a "plaintiff must identify the correct population for analysis." *Smith*, 196 F.3d at 368. Generally, this population will be those employees who were subject to the employment practice in question. *See id.; Lander v. Montgomery County Bd. of Commissioners*, 159 F.Supp.2d 1044, 1060 (S.D.Ohio 2001); *Shah v. New York State Dep't of Civil Serv.*, No. 94 CIV 9193 RPP, 2001 WL 839986, at *7 n. 7 (S.D.N.Y. July 25, 2001).

Here, plaintiffs identified four possible populations through the testimony of their expert witness, Dr. Janice Fanning Madden. Included in the four groups were all exempt employees at KAPL and those 245 exempt employees who were actually considered for the IRIF. Madden Tr. (Docket No. 154) at 17-18. There was sufficient evidence from which the jury could reasonably find that either group was the correct population for purposes of comparison. As to the population of exempt employees, the implementation of the IRIF commenced with that population within which those employees with excess skills were identified. Moreover, in its own internal analysis of the statistical impact of the IRIF on older employees, KAPL itself chose the population of 2.063 exempt employees for purposes of analysis. *See, e.g.*, Madden Tr. at 34; *see also* Fed.R.Evid. 801(d)(2) (admission by party-opponent). Thus, the record contained sufficient evidence from which the jury could conclude that the correct

population for purposes of comparison was KAPL's entire population of exempt employees.

There was also evidence from which the jury could find that the correct population was comprised of the 245 exempt employees whose positions were identified during the excess skills analysis as subject to the IRIF. It was this more limited group who were placed on the matrices and whose numerical scores were compared according to the procedures prescribed in the WAP. Thus, it was this group of exempt employees who were actually and universally subject to all aspects of defendants' implementation of the guidelines for selecting exempt employees for the IRIF-the employment practice identified by plaintiffs in their prima facie case. Accordingly, the record also contained sufficient evidence from which the jury could conclude that the correct population for purposes of comparison was the exempt employees who were placed on the matrices, *i.e.*, those actually considered for the IRIF. *See Smith*, 196 F.3d at 368 ("The [correct] population in a reduction-in-force situation consists of workers subject to termination.").

The second requirement is that a plaintiff demonstrate a statistically sufficient comparison between the predicted result for older employees in the population selected and the actual result. *Ottaviani*, 875 F.2d at 371; *see also Smith*, 196 F.3d at 366 (referring to "expected result" and "obtained result" rather than "predicted result" and "actual result"); *Hogan*, 109 F.Supp.2d at 104. This comparison serves to determine whether there is a statistically significant disparity between the predicted and actual results. For this case a predicted result is determined by the percentage of older employees in the population of employees subject to the IRIF. The actual result constitutes the percentage of older employees actually selected for the IRIF in the population subject to the IRIF. A comparison of the predicted and actual results must be made to determine if a statistically significant

disparity exists. *Smith*, 196 F.3d at 365-66; *Ottaviani*, 875 F.2d at 371.

"Statistical significance" measures "the probability that a disparity is simply due to chance rather than any other identifiable factor." *Ottaviani*, 875 F.2d at 371. One measure of statistical significance is standard deviation. *See Smith*, 196 F.3d at 365-66; *Ottaviani*, 875 F.2d at 371. Standard deviation is a "unit of measurement used to express the probability that an [actual] result is merely a random deviation from a predicted result." *Ottaviani*, 875 F.2d at 371. Generally, "'[t]he greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the [predicted] and [actual] results.'" *Id.* (quoting *Coates v. Johnson & Johnson*, 756 F.2d 524, 536 (7th Cir.1985)). If the actual result varies from the predicted result by two standard deviations,[27] "[courts] generally consider this level of significance sufficient to warrant an inference of discrimination." *Smith*, 196 F.3d at 366; *see also Ottaviani*, 875 F.2d at 371-72.

Here, as to the population of 2.063 exempt employees, there were 1,203, or fifty-eight percent, who were older employees. The predicted result from this population for the thirty-one exempt employees whose employment was terminated in the IRIF was thus fifty-eight percent of thirty-one, or eighteen older employees. The actual result was that thirty of the thirty-one employees, or ninety-seven percent,

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[27] Two standard deviations equates approximately "to a 1 in 20 chance that the outcome is a random fluctuation. Three standard deviations corresponds to approximately a 1 in 384 chance of randomness. Finally, a range of four to five standard deviations corresponds to a probability range of 1 chance in 15, 786 to 1 chance in 1,742,160." *Ottaviani*, 875 F.2d at 372 n. 7 (citing M. Abramowitz & I. Steigan, *Handbook of Mathematical Functions*, National Bureau of Standards, U.S. Government Printing Office, Applied Mathematics Series No. 55 (1966) (Tables 26.1, 26.2)).

whose employment was terminated in the IRIF were older employees. According to Dr. Madden, there was one chance in 348,000 that this actual result would occur. Madden Tr. at 20. This constitutes between four and five standard deviations.

As to the population of 245 exempt employees placed on the matrices and actually considered for the IRIF, there were 179, or seventy-three percent, who were older employees. The predicted result from this population for the thirty-one exempt employees whose employment was terminated in the IRIF was thus seventy-three percent of thirty-one, or twenty-three older employees. The actual result was thirty, or ninety-seven percent. According to Dr. Madden, there was one chance in 1,260 that this actual result would occur. Madden Tr. at 25-27. This constitutes between three and four standard deviations.[28]

Thus, whether the jury found that the correct population for comparison was the 2,063 exempt employees subject to the IRIF or the 245 exempt employees who were placed on matrices and actually considered for the IRIF, the statistical disparity substantially exceeded two standard deviations, permitting the jury to draw the inference that the disparity was caused by age discrimination. There was, therefore, sufficient evidence from which the jury could find that plaintiffs had satisfied their initial burden as to either group. Based on this evidence alone, defendants' contention that

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[28] Dr. Madden testified that she also analyzed the population of 245 employees who were placed on the matrices controlling for the particular matrix on which an employee was placed (*i.e.*, controlling for the particular group of employees against whom an employee was compared). From this analysis, Dr. Madden concluded that there was one chance in seventy-three, or between two and three standard deviations, that an actual result of thirty older employees out of thirty-one selected for the IRIF would occur. Madden Tr. at 23-27.

plaintiffs failed to meet their initial burden of demonstrating that the statistical disparity was caused by age discrimination must be rejected.

However, this conclusion is further supported by testimony offered by Dr. Madden during her redirect examination. The statistical evidence described above assessed the evidence to determine the probability that the statistical disparity between the predicted and actual results deviated from the norm by chance or for some other reasons, such as age discrimination. According to Dr. Madden, she also performed multiple regression analyses-"a statistical test which identifies factors, called independent variables, that might influence the outcome of an observed phenomenon, called a dependent variable." *Smith*, 196 F.3d at 363 n. 3. By this method, a statistician seeks to identify legitimate factors, other than age discrimination here, which may have influenced or caused the statistical deviation from the norm. *Id.*

Dr. Madden testified that she performed multiple regression analyses to determine if the statistical disparity could be explained by the individual components of the employees' numerical ratings on the matrices-years of service, performance appraisals, flexibility and criticality. Dr. Madden concluded that there was no significant correlation between an employees' years of service and the likelihood that he or she would be selected for the IRIF. Madden Tr. at 88. As to the other three components, Dr. Madden found that there existed statistically significant age effects in that older employees were more likely than younger employees to have experienced a decline in their performance appraisals after KAPL began planning for the IRIF and generally in the ratings for flexibility and criticality. *Id.* at 88-89. This evidence further supported the jury's finding that plaintiffs' satisfied their burden of proof to establish a prima facie case.

Accordingly, defendants' contention that there was insufficient evidence to establish a prima facie case must be rejected.

c. Evidence of Multiple Regression Analyses

Defendants contend that Dr. Madden's testimony regarding multiple regression analyses was erroneously admitted in evidence. Defs. Mem. of Law at 14-16.

Dr. Madden made no mention of multiple regression analyses in her expert witness reports, her deposition before trial or during her direct examination at trial. On cross-examination at trial, however, Dr. Madden was asked by defendants' counsel at least three times about additional analyses she had conducted. Madden Tr. at 38-39, 56-58, 76-77. In none of his questions did defendants' counsel limit Dr. Madden to analyses conducted prior to her reports or her deposition, and Dr. Madden testified each time that she had in fact conducted such analyses following her deposition and prior to trial. *Id.* In the most detailed colloquy, Dr. Madden was questioned as follows:

> Q. You did not do a regression analysis for criticality, did you?
> A. Yes.
> Q. And did you do one for flexibility?
> A. Yes.
>
> . . . . .
>
> Q. And for performance?
> A. Yes.
> Q. And for company service?
> A. Yes.

Madden Tr. at 58. On redirect examination, plaintiffs' counsel asked Dr. Madden the results of her multiple regression analyses. *Id.* at 83. Defendants' counsel objected that such analyses had not previously been disclosed to defendants. *Id.* The objection was overruled on the ground that the questions of defendants' counsel had "opened the door" and unless plaintiffs' counsel was permitted to ask Dr.

Madden about these analyses, the jury could infer that her analyses were unfavorable to plaintiffs. *Id.* at 83-87. Dr. Madden then testified to the results of her multiple regression analyses. *Id.* at 87-89.

A trial court is accorded "substantial deference" in making evidentiary rulings and those rulings are reviewed only for clear abuse of discretion. *Reilly v. Natwest Mkts. Group, Inc.*, 181 F.3d 253, 266 (2d Cir.1999); *see also Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 619-20 (2d Cir.1991). "Further, even an erroneous evidentiary ruling will not lead to reversal unless affirmance would be 'inconsistent with substantial justice.' " *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir.1997) (quoting Fed.R.Civ.P. 61).

Here, the ruling on defendants' objection was proper. Defendants' questions to Dr. Madden did not limit her answers to analyses she performed prior to her reports or her deposition. Defendants elicited testimony from Dr. Madden that she had performed multiple regression analyses but left unanswered the results of those analyses. If plaintiffs had not been permitted to elicit those results, the jury could reasonably have inferred that Dr. Madden's analyses were adverse to plaintiffs. Thus, the testimony of Dr. Madden on redirect examination was properly admitted and was not an abuse of discretion. *Cf. Caruolo v. A C & S, Inc.*, No. 93 CIV. 3752(RWS), 1999 WL 147740, at *14 (S.D.N.Y. Mar. 18, 1999) (holding that cross-examination by defendants of plaintiffs' expert witness opened the door to the admission of additional testimony on redirect examination of tests conducted by another expert and reported in a treatise), *aff'd in part and rev'd in part on other grounds*, 226 F.3d 46 (2d Cir.2000).

Moreover, while the testimony of Dr. Madden in this regard supported plaintiffs' claims, that testimony was limited, taking no more than two to three minutes (less than two pages of transcript) in a trial that lasted five weeks during

the liability phase alone. Its secondary importance is also underscored by the limited time devoted to it by counsel during their summations. Accordingly, even if the admission of this evidence was erroneous, any such error was harmless. *See* Fed.R.Evid. 61. Defendants' contention here must, therefore, be rejected.

2. Defendants' Burden of Production

Plaintiffs having satisfied their burden of establishing a prima facie case, the burden then shifted to defendants to offer a business justification for the challenged employment practice. *See Griggs,* 401 U.S. at 432, 91 S.Ct. 849; *Smith,* 196 F.3d at 365. The jury here found that defendants failed to meet this burden. Special Verdict (Docket No. 86) at 11. Defendants contend that this finding was erroneous as a matter of law. Defs. Mem. of Law at 17-21. Plaintiffs disagree. Pls. Mem. of Law at 19-20.

An employer's burden at this stage is to demonstrate "a legitimate business justification" for the challenged employment practice. *Wards Cove,* 490 U.S. at 643, 109 S.Ct. 2115. The employer's burden is one of production, not persuasion, as the burden of persuasion remains with the plaintiff throughout the case. *See id.; Watson,* 487 U.S. at 1008, 108 S.Ct. 2777; *EEOC v. Joint Apprenticeship Comm.,* 186 F.3d 110, 120 (2d Cir.1999). An employer meets this minimal burden by articulating a business necessity or reason for the employment practice. *See Watson,* 487 U.S. at 1008, 108 S.Ct. 2777.

The jury found that defendants had not met this burden. Defendants first argue that the jury was asked the "wrong question." Defs. Mem. of Law at 17. The verdict form asked the jury whether any defendant "has articulated a business justification for selecting the plaintiffs for termination of their employment in the reduction-in-force?" Special Verdict at 11. Defendants failed to object to this question prior to its submission to the jury. Charge Conference Tr. (Docket No. 163) at 44-48. Thus, the

question must rise to the level of plain error to be cognizable. *See Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 96 (2d Cir.1998) (applying plain error review where party failed to object to proposed special verdict form). Defendants do not claim plain error here and none appears from the record. Second, defendants fail to specify in what respect the question was incorrect and the question appears to reflect accurately defendants' burden at this stage.[29]

The business justification offered by defendants was the budgetary need to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions. Defs. Mem. of Law at 18. The presentation of this justification sufficed to satisfy defendants' burden of production. *See Wards Cove*, 490 U.S. at 643, 109 S.Ct. 2115. The consideration of defendants' justification at this stage permitted no qualitative assessment of its sufficiency by, for example, weighing defendants' business justification against other evidence in the case. *See Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir.1982) (holding that the wisdom of a business justification may not be questioned). Only if the business justification offered here was weighed against other evidence could the jury have found that defendants failed to meet their burden of production. Thus, as a matter of law, defendants met their burden of production at this stage.

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[29] Defendants also argue that the jury's finding on this question was somehow inconsistent with its finding on the disparate treatment theory. The two theories required proof of different elements and, therefore, the jury's findings were not internally inconsistent. *See Harris v. Niagara Mohawk Power Corp.*, 252 F.3d 592, 598 (2d Cir.2001) (holding that first question is whether asserted inconsistency can be resolved). Defendants' argument must, therefore, be rejected.

As noted above, the jury found to the contrary.[30] Nevertheless, this erroneous finding does not merit judgment as a matter of law or a new trial. First, although not required to do so in light of its finding that defendants failed to meet their burden of production, the jury proceeded to make findings at the third and final stage. The jury's findings at the third and final stage obviated the error made on defendants' burden of production and rendered that error harmless. *See Kotteakos v. United States*, 328 U.S. 750, 764-65, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *Bruneau ex rel. Schofield v.*

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[30] The jury was instructed as follows on defendants' burden of production:

> The second step requires you to determine whether the defendants have rebutted the presumption of discrimination arising under the first step of this theory. Under this step, the defendants must articulate, but not prove, a business justification for selecting the plaintiffs for termination of their employment in the reduction-in-force. This is *not* a burden of proof on the defendants and does not require the defendants to prove by any standard that the reason offered was the only reason for their decision to terminate the employment of the plaintiffs. Rather, the defendants have satisfied their burden in this step if you find that the defendants have presented a business justification for the selection of the plaintiffs for termination of their employment in the reduction-in-force. You need not find, nor need the defendants prove, that such justification was essential or indispensable to the defendants' business. If you find that the defendants have met this minimal burden, the presumption of discrimination arising under the first step is rebutted and plays no further part in your deliberations.

Jury Charge (Docket No. 85) at 28. The jury was also instructed not to answer the ultimate question regarding discrimination if it found that defendants' had not satisfied their burden of production. Jury Verdict at 11.

South Kortright Cent. Sch. Dist., 163 F.3d 749, 759 (2d Cir.1998) (holding that "when we are able to conclude that the verdict was not substantially influenced by the alleged error, then we may be quite confident the objecting party's rights were not prejudiced and may uphold the general verdict"). Second, as noted above, the issue presented here follows a trial on the merits. Thus, issues related to defendants' burden of production are not relevant at this stage and the only question is whether there was sufficient evidence to support the jury's ultimate finding of discrimination. *Ottaviani*, 875 F.2d at 373; *Mitchell*, 759 F.2d at 83.

Therefore, defendants satisfied their burden of production at the second stage as a matter of law. However, the jury's contrary finding in the circumstances of this case does not warrant granting defendants' motion for judgment as a matter of law or for a new trial. Defendants' motion on this ground is denied.

3. Discrimination

Defendants also contend that insufficient evidence was offered to support the jury's finding at the final stage that defendants' business justification for implementation of the guidelines for the IRIF was a pretext for age discrimination. Defs. Mem. of Law at 21-22.

"Even if the employer successfully defends the business necessity of the practice, the plaintiff may still prevail if she can show that the employer's proffered explanation was merely a pretext for discrimination." *Smith*, 196 F.3d at 365. One method by which a plaintiff may demonstrate pretext in a disparate impact case is by evidence "that another practice would achieve the same result at comparable cost without causing a disparate impact on the protected group." *Id.* (citing *Wards Cove*, 490 U.S. at 660-61, 109 S.Ct. 2115).

Here, plaintiffs offered evidence from which the jury could find that either of two alternative practices were available to defendants to achieve the same result without causing a disparate impact on older employees. First,

defendants could have instituted a temporary hiring freeze to achieve manpower limits. The evidence at trial established that following the VSP, KAPL was only one employee over its manpower ceiling. However, KAPL desired to hire an additional thirty-five new exempt employees. Freeh Tr. (Docket No. 143) at 25-26, 43-44. Second, KAPL could have offered the VSP to a greater number of employees to achieve the desired manpower reduction. The evidence established that a broadened VSP would have attracted sufficient employees to reduce KAPL's manpower to the desired level, its cost would have been no greater than that of the IRIF, KAPL could have rejected the VSP applications of any employees with critical skills, and any adverse impact on older employees would have been avoided. *Id.* at 44-49.

There is little dispute that either alternative offered by plaintiffs would have permitted defendants to achieve desired manpower levels at costs comparable to the cost of IRIF. Defendants argue, however, that plaintiffs failed to adduce evidence that either alternative would have been equally effective as the IRIF in maintaining the mix of essential skills among employees which KAPL required to perform its functions. There was evidence[31] from which the jury could have found that a limited hiring freeze would not have impaired KAPL's ability to perform its functions given the availability of employees with critical skills within the over 2,000 exempt employees. Moreover, the jury could also find

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[31] Defendants argue that the testimony of KAPL officials that the alternatives offered by plaintiffs would not be equally effective was unrebutted by plaintiffs and, therefore, should be accepted. The testimony of all such witnesses, however, was challenged and impeached by plaintiffs, and the jury was entitled to reject such testimony. After these issues were fully developed at trial and in light of the jury's findings, a court may not substitute its judgment on the credibility of witnesses for that of the jury. *See Reeves*, 120 S.Ct. at 2110 (citations omitted).

with respect to the broadened VSP alternative that KAPL could have retained employees with skills deemed critical by rejecting the applications of those employees. Thus, there was sufficient evidence before the jury from which it could conclude that the alternatives offered by plaintiffs would have been equally effective as the IRIF. Defendants' motion for judgment as a matter of law and a new trial on this ground is denied.

4. Willfulness

The ADEA mandates liquidated damages for a plaintiff, in an amount equivalent to a plaintiff's award for back pay and benefits, if a jury finds that the employer's violation of the ADEA was willful. 29 U.S.C. § 626(b); *see also McGinty v. State of N.Y.*, 193 F.3d 64, 68 (2d Cir.1999). The jury here found that defendants KAPL and Lockheed Martin acted willfully in discriminating against plaintiffs, entitling each prevailing plaintiff to liquidated damages. Special Verdict at 12. Defendants contend that this finding was erroneous as a matter of law. Defs. Mem. of Law at 23-24.

An employer acts "willfully" under the ADEA "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (citations and quotations omitted). Thus, either knowledge or reckless disregard is required to establish willfulness. *See McGinty*, 193 F.3d at 68.

Defendants contend first that the jury's finding of willfulness was inconsistent with its finding that defendants did not intentionally discriminate against plaintiffs under plaintiffs' disparate treatment theories. However, the questions of "intentional" and "willful" conduct presented different issues for the jury. "Intentional" conduct required evidence that defendants were motivated by plaintiffs' ages to select them for the IRIF. *See Cronin v. Aetna Life Insurance Co.*, 46 F.3d 196, 203 (2d Cir.1995) "Willful" conduct required evidence that defendants showed reckless disregard

for whether their conduct violated the ADEA. Thus, an employer could act willfully by recklessly ignoring the impact an employment practice had on older employees but could act intentionally only if his employment decision was based at least in part on an employee's age. *See Kolstad v. American Dental Ass'n,* 527 U.S. 526, 549, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999); *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 126-27, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). Because the requirements for willful and intentional conduct differ, the jury's different findings on those two questions are not inconsistent and its finding of willfulness on the disparate impact theory was not error as a matter of law for that reason.

Defendants also argue that the evidence of defendants' willfulness was insufficient as a matter of law. First, defendants ask the Court to accept the testimony offered by KAPL officials denying willfulness. The credibility of that testimony presented a question of fact for the jury, not the Court. As noted above, the jury was entitled to reject the testimony by KAPL officials and to accept the evidence supporting a finding of willfulness. *See* note 22 *supra.* The evidence adduced at trial which supported a finding of willfulness included the following:

- KAPL officials and employees were aware that the ADEA prohibited employment practices which caused disparate impacts on older employees;
- Defendants were aware that the implementation of the guidelines for the IRIF would result in a disparate impact on older employees, in that thirty of the thirty-one employees selected for the IRIF were older employees, but took no meaningful steps to avoid or mitigate that impact;
- The guidelines for the IRIF dictated that KAPL perform a statistical assessment of the group of employees selected for termination of their employment to identify any disparate impact on older employees. Such an assessment was performed by a

KAPL employee which compared the average age of the KAPL workforce of over 2,000 before the IRIF with its average age after the IRIF. In fact, as acknowledged by KAPL at trial and as was self-evident, this statistical assessment was incapable of identifying any disparate impact on older employees. Burek Tr. (Docket No. 146) at 260; Correa Tr. (Docket No. 150) at 26-32. The jury was entitled to conclude from this lone statistical assessment by KAPL prior to the IRIF that KAPL recklessly disregarded what should have been apparent from the fact that thirty of the thirty-one employees selected for the IRIF were older employees.

- At the same time that KAPL was proceeding to select thirty older employees out of a total of thirty-one for the IRIF, KAPL was proceeding to hire thirty-five new employees, virtually all of whom were younger employees. The jury was entitled to infer from this evidence that KAPL was motivated to disregard the disparate impact of the IRIF on older employees by its desire to hire new and younger employees.

There was, therefore, sufficient evidence for a reasonable jury to find that defendants KAPL and Lockheed Martin acted willfully in disregarding the disparate impact on older employees caused by the IRIF. Defendants' argument to the contrary must be rejected.

5. Liability Under the HRL

Defendants contend that they are entitled to judgment as a matter of law on plaintiffs' claim under the HRL. Defs. Mem. of Law at 25-26. The ADEA defines the protected class of older employees as those forty years of age or older. 29 U.S.C. § 631(a). The HRL defines the protected class as those over the age of eighteen. N.Y. Exec. Law § 296(3-a)(a). *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 461 (2d Cir.), *cert. denied*, 534 U.S. 993, 122 S.Ct. 460, 151 L.Ed.2d 378 (2001). Defendants argue that plaintiffs

offered no evidence of any disparate impact from the IRIF on employees over age eighteen.

This contention fails for two reasons. First, defendants raise this argument for the first time on this motion. Defendants did not seek summary judgment on this ground, did not include this ground in their motions in limine and failed to seek judgment as a matter of law on this ground at the close of the plaintiffs' case or at the close of all the evidence. Moreover, defendants failed to request a jury instruction to this effect, failed to object to the jury instruction linking plaintiffs' claims under the ADEA with those under the HRL,[32] and failed to object to a special verdict form which also linked the claims under the two statutes. Defendants' failure to object at any prior stage waived the objection they now assert. *See Tuttle v. Equifax Check*, 190 F.3d 9, 15-16 (2d Cir.1999); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d cir.1993) (holding that vessel owner waived objection to sufficiency of the evidence to support verdict for injured longshoreman by failing to renew its motion for directed verdict at close of all the evidence); *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 55 (2d Cir.1992) ("Failure to object to a jury instruction or the form of an interrogatory prior to the jury retiring results in a waiver of that objection.").

Second, defendants' statement of the law appears incorrect. Several courts have noted the differences in the definitions of the protected classes under the ADEA and the HRL. *See, e.g., Gonzalez*, 135 F.Supp.2d at 400 n. 11; *Hogan v. Metromail*, 107 F.Supp.2d 459, 470-71 (S.D.N.Y.2000);

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[32] The jury was instructed to "consider the plaintiffs' claim under the state Human Rights Law ... *identically* to your consideration of the plaintiffs' claims ... under the Age Discrimination in Employment Act...." Jury Charge at 14 (emphasis added).

Abdu-Brisson v. Delta Air Lines, Inc., No. 94 Civ. 8494(HB), 1999 WL 944505, at *4 n. 4 (S.D.N.Y. Oct. 19, 1999), *aff'd*, 239 F.3d 456 (2d Cir.), *cert. denied*, 534 U.S. 993, 122 S.Ct. 460, 151 L.Ed.2d 378 (2001). As defendants acknowledge, however, research has revealed no cases addressing this issue. In the absence of any controlling decision to the contrary, guidance must be taken from the Second Circuit's statement in *Smith* that since, as here, "claims under the [HRL] are analyzed *identically* to claims under the ADEA and Title VII, the outcome of an employment discrimination claim made pursuant to the [HRL] is the same as it is under the ADEA and Title VII." *Smith*, 196 F.3d at 363 n. 1 (emphasis added).

Accordingly, defendants' motion on this ground is denied.

C. Damages

The jury awarded damages to the seventeen remaining prevailing plaintiffs in varying amounts for back pay, front pay and emotional distress, both past and future. Defendants move for a new trial or remittitur of the damages awarded to all remaining plaintiffs except James R. Quinn. Defs. Mem. of Law at 26-72.

If a district court finds that damages awarded by a jury are excessive, it may grant a defendant's motion for a new trial in whole or limited to damages, or it may grant remittitur by conditioning denial of a defendant's motion for a new trial on a plaintiff's accepting damages in a reduced amount. *See Tingley Sys., Inc. v. Norse Sys., Inc.*, 49 F.3d 93, 96 (2d Cir.1995); *Tanzini v. Marine Midland Bank*, 978 F.Supp. 70, 77 (N.D.N.Y.1997) (McAvoy, J.). Remittitur is "the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1328 (2d Cir.1990) (quoting *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2d Cir.1984)). "It is not among the powers of the ... court ... simply to reduce the damages without offering the prevailing party the option of a new trial." *Lightfoot v. Union*

Carbide Corp., 110 F.3d 898, 914-15 (2d Cir.1997) (quoting *Tingley Sys., Inc.*, 49 F.3d at 96). A reduced award should represent "the maximum award that would not be excessive." *Ragona v. Wal-Mart Stores, Inc.*, 62 F.Supp.2d 665, 668 (N.D.N.Y.1999) (McAvoy, J.), *aff'd*, 210 F.3d 355 (2d Cir.2000).

Awards of damages for back pay and front pay are authorized under both the ADEA and the HRL, but awards of damages for emotional distress are authorized only by the HRL. *See Haskell v. Kaman Corp.*, 743 F.2d 113, 120-21 (2d Cir.1984)(holding that "plaintiffs are not entitled to recovery for emotional distress in ADEA actions") (citing *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir.1984)); *Young v. Bank of Boston Conn.*, No. 93 CV 1642(AVC), 1996 WL 756504, at *3 n. 2 (D. Conn. June 18, 1996). The standard for review of damages awarded by a jury under a federal law such as the ADEA is the traditional common law standard whether the award "shocks the conscience." *See Consorti v. Armstrong World Indus., Inc.*, 103 F.3d 2, 4 (2d Cir.1995); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1189 (2d Cir.1992).

The standard for review of damages awarded by a jury under a state law such as the HRL is defined by the applicable state law. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 419-20, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); *Fowler v. Industrial Tire Products, Inc.*, 2001 WL 51007, at *1, 2 Fed.Appx. 125 (2d Cir.2001). The standard under New York law is set forth in N.Y. C.P.L.R. § 5501(c) (McKinney Supp.2001), which directs a court to "determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." The "deviates materially" standard under New York law is less deferential to the jury's verdict than is the "shocks the conscience" standard. *See Gasperini*, 518 U.S. at 424, 116 S.Ct. 2211; *Gasperini v. Center for Humanities, Inc.*, 149 F.3d 137, 139 (2d Cir.1998) (noting on appeal after remand that the New

York standard is "more favorable to the party challenging the award than is the federal 'shocks the conscience' review"). Thus, the jury's awards of damages for back pay and front pay under both the ADEA and the HRL and its awards of damages for emotional distress implicate different standards of review on defendants' motion here. In addition, defendants present different arguments under each element of damages.

1. Back Pay

"A plaintiff who has proven a discharge in violation of the ADEA is, as a general matter, entitled to back pay from the date of discharge until the date of judgment." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 167 (2d Cir.1998); *accord, Banks v. Travelers Cos.*, 180 F.3d 358, 364 (2d Cir.1999). With respect to the damages for back pay awarded by the jury, defendants contend that certain plaintiffs failed to mitigate such damages and, therefore, the awards of back pay to those plaintiffs was erroneous as a matter of law.

An employee discharged as the result of discrimination "has an obligation to attempt to mitigate her damages by using 'reasonable diligence in finding other suitable employment.'" *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 695 (2d Cir.1998) (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982)). An employee's duty to mitigate is "not onerous" and does not require that an employee actually find other employment. *Id.; Dailey v. Societe Generale*, 108 F.3d 451, 456 (2d Cir.1997). On this issue, a defendant bears the burden of proving "(1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it." *Hawkins*, 163 F.3d at 695; *Dailey*, 108 F.3d at 456. In considering other employment, a discharged employee "need not go into another line of work, accept a demotion, or take a demeaning position." *Ford Motor Co.*, 458 U.S. at 231, 102 S.Ct. 3057. However, an employer "is released from the duty to establish the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such

employment." *Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 54 (2d Cir.1998). The "ultimate question" is whether a discharged employee "acted reasonably in attempting to gain other employment or in rejecting proffered employment." *Hawkins,* 163 F.3d at 695 (quoting *Pierce v. F.R. Tripler & Co.,* 955 F.2d 820, 830 (2d Cir.1992)).

2. Front Pay

The ADEA authorizes the district court to fashion equitable remedies "to ensure that victims of age discrimination are made whole." *Whittlesey v. Union Carbide Corp.,* 742 F.2d 724, 727 (2d Cir.1984). The ADEA explicitly authorizes a court to require the reinstatement of a discharged employee. *See* 29 U.S.C. § 626(b). However, where reinstatement is not feasible, a district court may award an employee front pay. *Banks,* 180 F.3d at 364. Defendants here concede that reinstatement of all prevailing plaintiffs is impossible and impracticable. Defs. Mem. of Law at 63. Front pay may be awarded for future lost earnings to make "victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment." *Padilla v. Metro-North Commuter R.R.,* 92 F.3d 117, 125-26 (2d Cir.1996) (quoting *Whittlesey,* 742 F.2d at 729). "While a jury determines back pay, the determination of any front pay award is committed exclusively to the district court's equitable jurisdiction." *Banks,* 180 F.3d at 364; *Tanzini,* 978 F.Supp. at 80. However, a court may receive an advisory verdict from a jury on front pay. *See Hogan v. General Elec. Co.,* 144 F.Supp.2d 138, 144 (N.D.N.Y.2001) (Hurd, J.); *Tanzini,* 978 F.Supp. at 80. Here, the jury returned advisory verdicts on front pay for plaintiffs which the Court adopted when it entered judgment on the jury's verdicts.

Defendants challenge the jury's awards of front pay on the grounds that there was insufficient evidence from which to find that the plaintiffs to whom front pay was awarded lacked reasonable prospects of obtaining comparable

employment in the future and it required undue speculation to determine the amount of income such plaintiffs would have earned in the future if their employment had not been terminated. Defs. Mem. of Law at 63. Awards of front pay are necessarily peculiar to the facts of each case and, because such an award requires a degree of prediction, "always involve some degree of speculation...." *Tanzini,* 978 F.Supp. at 81 (quoting *Tyler,* 958 F.2d at 1189). Nevertheless, there must exist sufficient evidence from which the factfinder may reasonably determine the likelihood that a discharged employee will find suitable employment in the future, the amount of income the employee may reasonably be expected to earn in the future, the amount of income the employee reasonably would have earned if his employment with the defendant had not been terminated, and the duration of such employment with the defendant. *See Padilla,* 92 F.3d at 124-26; *Whittlesey,* 742 F.2d at 728; *Tanzini,* 978 F.Supp. at 81.

3. Emotional Distress

Defendants contend that the jury's awards of damages for emotional distress under the HRL deviate materially from what would constitute reasonable compensation under New York law. In determining whether a jury's award of such damages was excessive under the New York standard, the reasonableness of a particular award must be determined by reference to verdicts in similar cases. *See Gasperini,* 518 U.S. at 424, 116 S.Ct. 2211. Damages for emotional distress may not be presumed and are not established simply by evidence of a defendant's discriminatory conduct. *See Tanzini,* 978 F.Supp. at 78. However, such damages may be established by the plaintiff's testimony alone. *See id.*

Where a plaintiff's emotional distress consisted of shock, sleepless nights, nightmares, moodiness, humiliation, upset and the like but the plaintiff did not require treatment,[33] the

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[33] Such evidence of emotional distress has frequently been referred to in cases as "garden variety" emotional distress. *See,*

range of awards sustained by courts in similar cases appears to be from $5,000 to $125,000. *See, e.g., Shannon v. Fireman's Fund Ins. Co.*, 156 F.Supp.2d 279, 296-98 (S.D.N.Y.2001) (reducing award of $80,000 for emotional distress in age discrimination case to $40,000); *Epstein v. Kalvin-Miller Int'l, Inc.*, 139 F.Supp.2d 469, 479-81 (S.D.N.Y.2001) (upholding jury award of $54,000 for emotional distress for age discrimination and concluding that "some courts have remitted emotional distress awards to between $30,000 and $125,000 where the only evidence of emotional distress has been the plaintiff's testimony that he was distressed, even when no physical manifestations have been claimed"); *Fowler v. New York Transit Auth'y*, No. 96 Civ. 6796(JGK), 2001 WL 83228, at *10-15 (S.D.N.Y. Jan. 31, 2001) (reducing award of $50,000 for emotional distress for racial discrimination to $25,000); *Distefano v. Long Island R.R. Co.*, No. 96 CV 5487, 1999 WL 1704784, at *5-7 (E.D.N.Y. Dec. 21, 1999) (reducing damages for emotional distress in age and gender discrimination case from $7,000,000 to $125,000); *Funk v. F & K Supply, Inc.*, 43 F.Supp.2d 205, 226-29 (N.D.N.Y.1999) (McAvoy, J.) (reducing awards of $850,000 and $450,000 for emotional distress under the HRL in gender discrimination case to $30,000 each); *Courtney v. City of New York*, 20 F.Supp.2d 655, 660-62 (S.D.N.Y.1998) (finding that maximum award of

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e.g., Jessamy v. Ehren, 153 F.Supp.2d 398, 401 (S.D.N.Y.2001); *Shannon v. Fireman's Fund Ins. Co.*, 156 F. Supp.2d 279, 297 (S.D.N.Y.2001); *Epstein v. Kalvin-Miller Int'l, Inc.*, 139 F.Supp.2d 469, 479 (S.D.N.Y.2001) ("[a] 'garden variety' emotional distress claim is one that did not require medical treatment"); *Ruhlmann v. Ulster County Dep't of Social Servs.*, 194 F.R.D. 445, 449 & n. 6 (N.D.N.Y.2000) (Hurd, J.); *Funk v. F & K Supply, Inc.*, 43 F.Supp.2d 205, 227 (N.D.N.Y.1999) (McAvoy, J.); *Luciano v. Olsten Corp.*, 912 F.Supp. 663, 672 (E.D.N.Y.1996), *aff'd*, 110 F.3d 210 (2d Cir.1997).

damages for emotional distress in similar cases is $100,000); *Sanderson v. City of New York*, No. 96-Civ. 3368(LLS), 1998 WL 187834, at *7-10 (S.D.N.Y. Apr. 21, 1998) (finding that awards upheld in similar cases did not exceed $100,000 and reducing jury's award to four plaintiffs in an age discrimination case from $450,000 for each plaintiff to between $10,000 and $100,000); *Tanzini*, 978 F.Supp. at 78-80 (collecting cases and finding applicable range in such cases to be from $5,000 to $30,000); *Allender v. Mercado*, 233 A.D.2d 153, 649 N.Y.S.2d 144 (1st Dep't 1996) (upholding award of $100,000 for mental anguish in an employment discrimination suit); *Boutique Indus., Inc. v. New York State Div. of Human Rights*, 228 A.D.2d 171, 643 N.Y.S.2d 986 (1st Dep't 1996) (reducing award of $150,000 to $100,000 in an age discrimination suit); *see also Shea v. Icelandair*, 925 F.Supp. 1014, 1019-30 (S.D.N.Y.1996) (reducing jury's award for emotional distress in an age discrimination case from $250,000 to $175,000 and finding that "[t]he most important factor that sets this case apart from others involving emotional pain and suffering is the fact that [defendant's] discriminatory conduct had physical consequences").

What appears from a review of these cases is that courts have exhibited substantial disagreement over what constitutes reasonable compensation for emotional distress under the HRL where the evidence supporting a plaintiff's claim rests exclusively on testimony establishing shock, nightmares, sleeplessness, humiliation, moodiness and similar consequences but without significant physical manifestations or the need for treatment. However, those cases identify factors which affect the determination of the reasonableness of a jury's award, including the nature, severity and duration of such consequences. It further appears that where those consequences do not include physical manifestations or treatment by a medical care provider, the maximum award which does not deviate materially from awards in comparable cases is $125,000.

4. Individual Plaintiffs

Defendants' challenges to the damages awarded to the individual plaintiffs require separate consideration of the evidence presented as to each plaintiff.

a. Raymond E. Adams

Defendants contend that the jury's award of a total of $294,795.60 to plaintiff Raymond E. Adams ("Adams") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 50-52.

Adams was forty-eight at the time of the IRIF. He held the position of Team Coordinator at that time with an annual salary of approximately $49,600. He had been employed by KAPL or its parent company for approximately thirty years. Adams has held two positions with other employers since the IRIF at comparable salaries and is presently employed as a project manager at a manufacturing company. The evidence of Adams' emotional distress consisted of Adams' testimony that he was shocked and devastated by the IRIF, he suffered stress at the loss of his job as he was the sole support for his family, he suffered sleeplessness for months, he was lethargic, he felt small and inadequate, and he has worried constantly since the IRIF about having his employment terminated again. Adams Tr. (Docket No. 180) at 237-89.

The evidence supporting Adams' claim for emotional distress consisted exclusively of shock, sleeplessness, upset and similar consequences but involved no physical manifestations and required no treatment. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Adams' damages for emotional distress is granted unless Adams files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

b. Wallace Arnold

The jury awarded plaintiff Wallace Arnold ("Arnold") back pay in the amount of $172, 899.95 and damages for emotional distress totaling $118,778.41. Defendants contend that Arnold's back pay award should be reduced for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 42-43, 72. Defendants do not challenge the front pay awarded to Arnold.

Arnold was forty-one at the time of the IRIF. Arnold held a doctorate in Environmental Engineering and was employed as a Chemical Waste Engineer at the time of the IRIF earning approximately $44,000 annually. Arnold had been employed by KAPL since 1984, he was married and had two teenage children. Following the IRIF, Arnold accepted a contract research position at Pennsylvania State University in State College, Pennsylvania which paid approximately $27,000 annually. The contract for that position ended in June 1997 and was not renewed. Arnold and his family then returned to the Albany area where he held positions as a truck driver, bank teller, laundromat worker and gas station attendant and pursued courses to obtain a certificate to teach high school chemistry. Arnold Tr. (Docket Nos. 168, 169).

Defendants argue that while employed at Penn State, Arnold failed to mitigate his damages by seeking comparable employment even though he was aware that the contract for his employment there would end in or about June 1997. However, Arnold testified that he accepted this position in the hope that it would serve as an entry to a teaching position. The jury was entitled to credit this testimony, to find that Arnold's efforts in this period pursuing a teaching position constituted reasonable efforts to obtain comparable employment and to conclude that defendants had failed to meet their burden of proof on this issue. *See Padilla,* 92 F.3d at 125-26. Accordingly, the record sufficiently supported the jury's award of back pay to Arnold, and that award was not

substantially erroneous or a miscarriage of justice. Defendants' motion for a new trial on this issue is denied.

The evidence supporting Arnold's claim of emotional distress derived solely from Arnold's testimony. Arnold testified that in the aftermath of the IRIF, he was shocked, devastated and humiliated. He lost twenty to thirty pounds and was unable to sleep for months. Arnold testified that he felt severe shame and humiliation at the loss of his position at KAPL and at the series of jobs he held following the IRIF to support his family, feelings which persisted to the time of trial. Finally, Arnold testified that the IRIF and its aftermath was a significant contributing factor in his wife's decision to separate from him. Arnold Tr. (Docket No. 168) at 1098-1155. Although there was no evidence that Arnold ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Arnold's damages for emotional distress is denied.

c. Deborah L. Bush

The jury awarded plaintiff Deborah Bush ("Bush") back pay in the amount of $32,152.97, front pay in the amount of $70,625.15, and damages for emotional distress totaling $111,578.41. Defendants contend that they are entitled to a new trial or remittitur on all such awards. Defs. Mem. of Law at 47-49, 65-66.

Bush was forty-one at the time of the IRIF and was the single mother of an eight year old son. She had received a degree in secretarial science and was employed as an administrative specialist at the time of the IRIF earning an annual salary of approximately $35,000. She had been employed by KAPL for twenty-two years. Six months after the IRIF, Bush found a position as a secretary at another company paying approximately $25,000 annually. She accepted a position as a secretary at another company in

February 1998 where she remained at the time of trial earning approximately $32,000 annually. Bush Tr. (Docket No. 179).

Defendants challenge the jury's back pay award to Bush on the ground that she failed to satisfy her duty to mitigate damages when she moved to a new position at a lower salary and by failing to continue to seek employment comparable to her position at KAPL. In February 1998, Bush was earning approximately $27,500 annually when she accepted a position at another company which paid approximately $26,000 annually. Bush testified that she accepted the lower paying position because her opportunities for promotion were greater at the second company. In fact, her annual salary there had risen to almost $32,000 by the time of trial. Bush also testified that she had continued to seek employment comparable to her administrative position at KAPL: by checking advertisements but had found nothing to pursue.[34] Whether Bush's testimony was credible and her efforts to find comparable employment reasonable were questions for the jury. On this record the jury was entitled to find that defendants had not satisfied their burden of proving that Bush failed to mitigate her damages in either respect. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion for a new trial on the issue of the jury's award of back pay to Bush is denied.

Defendants challenge the front pay award to Bush on the grounds that Bush failed to establish the absence of any prospect of obtaining comparable employment and that the duration of the front pay award was unduly speculative. The evidence at trial established that Bush's only post-high school

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[34] Bush testified that in the summer of 1996, KAPL itself considered her application for re-employment there but only for a secretarial position paying approximately $27,000 annually. Bush Tr. at 18-19.

education was for a position as a secretary, the only position she was offered after the IRIF, including from defendants, was as a secretary, and that Bush had continued to check newspaper advertisements for employment comparable to her position at KAPL but had found none. From this record, there was sufficient evidence to conclude that Bush had no reasonable prospect of obtaining a position comparable to her administrative position at KAPL in the foreseeable future.

Bush was awarded front pay as compensation for a period of ten years. Special Verdict (Docket No. 126) at 1. Given Bush's age and the absence of prospects for comparable employment, it was reasonable to conclude that front pay for a period of ten years was "necessary to provide whole relief for [a] victim[ ] of employment discrimination." *Padilla*, 92 F.3d at 126 (upholding front pay intended to provide compensation over a period of twenty years).[35] This conclusion was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of front pay for Bush is denied.

Finally, defendants contend that the jury's award of damages to Bush for emotional distress was excessive and remittitur to $10,000 should be granted. Bush herself presented the only evidence supporting her claim of emotional distress. She testified that following the IRIF, she

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[35] Front pay was awarded to only seven of the eighteen plaintiffs here and the duration of each varied as follows: 1.25 years (Arnold), two years (Reynheer), nine years (Palmatier), 9.75 years (Adams), ten years (Bush), twelve years (Townsend) and 12.5 years (Woodman). Special Verdicts (Docket Nos. 119, 124, 126, 128). Thus, it appears that in rendering its advisory verdicts on front pay, the jury followed its instruction that "[t]he claim for damages of each plaintiff, and the evidence related to that claim, must be considered and weighed by you on its own merits. Whether you award damages to one plaintiff, or the amount of any such damages, has no bearing on any other plaintiff's claim for damages." *See, e.g.*, Jury Charge (Docket No. 127) at 11-12.

was upset, ashamed and humiliated. She also experienced headaches, sleeplessness, stomach upset and weight gain. Bush further testified that while these symptoms abated after several months, the headaches and stomach distress continued at reduced frequencies to the time of trial. Bush Tr. at 8-24. Although there was no evidence that Bush ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Bush's damages for emotional distress is also denied.

d. William R. Chabot

Defendants contend that the jury's award of a total of $119,734.85 to plaintiff William R. Chabot ("Chabot") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 40-42.

Chabot was fifty-seven at the time of the IRIF. He was a computer specialist at that time with an annual salary of approximately $50,000. He had been employed by KAPL for thirty-six years. Chabot was unable to find other suitable employment and began collecting his pension from KAPL in February 1996. The evidence of Chabot's emotional distress consisted of the testimony of Chabot and his wife that he was shocked, embarrassed and humiliated by the IRIF, he has suffered sleeplessness since the IRIF, he was ashamed and withdrew from interaction with his sons and others, and he became indecisive and was argumentative with his family. Chabot Tr. (Docket No. 173) at 139-53, 180-81. Although there was no evidence that Chabot ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Chabot's damages for emotional distress is denied.

e. Allen E. Cromer

Defendants contend that the jury's award of a total of $74,734.85 to plaintiff Allen E. Cromer ("Cromer") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 52-53. Defendants do not challenge the award to Cromer of $17,326.06 for back pay.

Cromer was forty-two at the time of the IRIF. He was a specialist performing inspections at that time earning an annual salary of approximately $43,000. He had been employed by KAPL for fifteen years. Cromer was re-employed by KAPL in September 1996 in a janitorial position and was promoted up to an inspector position in July 1997 at an annual salary of approximately $38,000. Cromer Tr. (Docket No. 173) at 218-24. Cromer subsequently was promoted to another position in the same field, comparable but inferior to his position at the time of the IRIF, at an annual salary of approximately $42,000 which he held at the time of trial. *Id.* at 225-26.

The evidence of Cromer's emotional distress consisted solely of the testimony of Cromer that he was scared and frightened when he receive notice of the IRIF, he has suffered sleeplessness since receiving that notice, he suffered chest pains due to the stress of the IRIF and received medical care for both the sleeplessness and the chest pains, he withdrew socially, and he was humiliated and embarrassed. Moreover, Cromer testified that during his ten months as a janitor, he was deeply humiliated to be seen by his former co-workers performing what he believed were menial tasks and was occasionally called derisive names by former co-workers. Cromer Tr. at 195-99, 215-31, 249-50. Based on this and other testimony, the jury's award does not deviate materially from the maximum compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Cromer's damages for emotional distress is denied.

f. Thedrick L. Eighmie

The jury awarded plaintiff Thedrick L. Eighmie ("Eighmie") back pay in the amount of $25,585.00 and damages for emotional distress totaling $40, 275.00. Defendants contend that Eighmie's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 55-56, 71-72.

Eighmie was fifty-three at the time of the IRIF. Eighmie held a master's degree in Ceramic Engineering and was employed as an engineer at the time of the IRIF earning approximately $54,000 annually. Eighmie had been employed by KAPL since 1979, he was married and had three children, two were in college and one in high school. Following the IRIF, Eighmie found no other employment. He started a financial consulting business, but that business had few clients and Eighmie earned less than $11,000 total in the four years following the IRIF. Eighmie Tr. (Docket No. 187) at 343-73.

Defendants argue that as a matter of law, Eighmie took insufficient steps to satisfy his duty to mitigate damages by finding comparable employment and, therefore, defendants are entitled to judgment at a matter of law or to a new trial on the issue of the jury's award of back pay to Eighmie. However, Eighmie testified that following the IRIF, he prepared a new resume, checked for job listings in local newspapers and at KAPL, and the Department of Labor, attended seminars on interview techniques, provided a copy of his resume to a job placement agency, went on one job interview, contacted a KAPL representative concerning the availability of a position in addition to making efforts to start his financial consulting business. Eighmie Tr. at 355-73. While defendants elicited other evidence of steps Eighmie could have taken to obtain other employment, the questions of the credibility of Eighmie's testimony and the reasonableness of Eighmie's efforts were issues of fact for determination by

the jury. Crediting Eighmie's testimony, there was sufficient evidence to support the jury's finding that defendants failed to sustain their burden of proving that Eighmie failed to mitigate his damages. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion on this ground is denied.

The evidence of Eighmie's emotional distress consisted solely of Eighmie's testimony that he was angry and felt betrayed when the IRIF was announced, feelings which had continued to the time of trial. As the sole support for his family and with three college-age children, Eighmie felt like a failure and worried about how he would support his family in the future. Eighmie and his wife were forced by financial constraints to cancel a twenty-fifth wedding anniversary cruise that they had planned with friends. Eighmie suffered sleeplessness following the IRIF which continued to the time of trial. Eighmie Tr. at 343-52, 363. Eighmie never sought treatment for any consequences he experienced from the IRIF. From this testimony, the jury's award does not deviate materially from the maximum compensation of $125, 000 found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Eighmie's damages for emotional distress or for remittitur is denied.

g. Paul M. Gundersen

Defendants contend that the jury's award of a total of $130,578.41 to plaintiff Paul M. Gundersen ("Gundersen") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 60-62. Defendants do not challenge the award to Gundersen of $14,820.15 for back pay.

Gundersen was forty-six at the time of the IRIF. He was a mechanical specialist at that time with an annual salary of approximately $44,000. He had been employed by KAPL or its parent company for twenty-eight years. Gundersen is married and the father of two adult children. Following the IRIF, Gundersen found and maintained other employment at a

salary slightly reduced from that at KAPL. Gundersen Tr. (Docket No. 182) at 328-40.

The evidence of Gundersen's emotional distress consisted of the testimony of Gundersen and his wife that he was initially humiliated when he broke down crying at the staff meeting announcing those selected for the IRIF. He has experienced sleeplessness and nightmares continuously since the IRIF, and he has lost interest in many things. Gundersen further testified that he had been diagnosed with depression eight months prior to the IRIF for which he was prescribed an antidepressant. Gundersen testified that his depression was exacerbated by the IRIF, an effect which continued to the time of trial, and that the dosage of his medication was doubled as a result of the IRIF and remained so to the time of trial. Moreover, Gundersen and his wife testified that following the IRIF and as a consequence thereof, Gundersen had gained approximately one hundred pounds by the time of trial. Gundersen Tr. at 328-40, 456-57.

The testimony of Gundersen and his wife established not only the emotional consequences similar in kind to that suffered by other plaintiffs-humiliation, shock, sleeplessness, nightmares, reduced self-esteem and the like-but also physical and mental manifestations of emotional distress. In particular, that testimony established that Gundersen experienced a substantial weight gain and that his pre-existing depression was made worse by the IRIF, both of which had persisted in the five years since the IRIF. Thus, the jury's award to Gundersen for emotional distress did not deviate materially from the maximum compensation found reasonable in other similar cases. *See, e.g. Shea,* 925 F.Supp. at 1019-30. Accordingly, defendants' motion for a new trial or remittitur on the issue of the jury's award of damages to Gundersen for emotional distress is denied.

h. Clifford J. Levendusky

The jury awarded plaintiff Clifford J. Levendusky ("Levendusky") back pay in the amount of $21,461.17 and

damages for emotional distress totaling $147,683.21. Defendants contend that Levendusky's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 46-47, 68-69.

Levendusky was fifty-four at the time of the IRIF. He was employed as an engineering specialist earning approximately $52,000 annually. Levendusky had been employed by KAPL or its parent company for over thirty years, he was married and had two sons, one in college and the other recently graduated from college. On March 4, 1996, Levendusky was rehired by KAPL as a plumber/steamfitter at an hourly rate at which he earned an average of $42,500 annually over the next four years. Levendusky Tr. (Docket No. 173) at 274-98.

Defendants argue that because Levendusky failed to seek other employment either inside or outside KAPL after his return to KAPL, he failed to satisfy his obligation to mitigate damages and, therefore, was not entitled to an award for back pay. However, Levendusky testified that immediately following the IRIF, he had contacted the KAPL Human Resources Manager about the possibility of being rehired by KAPL in his former position but was told by the manager that "It's out of the question." Levendusky Tr. at 286-87. Levendusky further testified that after his return to KAPL, he checked the listings of job openings within KAPL but saw no listing for a position comparable to his former position for which he might be qualified. *Id.* at 294-95. The jury was entitled to find from Levendusky's re-employment, the KAPL manager's discouragement of Levendusky's efforts within KAPL and the results of Levendusky's checks of the KAPL internal job listings that defendants had failed to meet their burden of proving that Levendusky failed to mitigate his damages and that Levendusky's efforts in these circumstances were reasonable. This finding was neither substantially

erroneous nor a miscarriage of justice. Defendants motion on this ground is denied.

The evidence of Levendusky's emotional distress consisted solely of Levendusky's testimony that he was shocked when told that he had been selected for the IRIF. His shock was exacerbated because at an awards banquet two months before the IRIF at which Levendusky received an award for his years of service, defendant Freeh had shaken his hand and told him not to worry about the IRIF. Levendusky Tr. at 282-83. Levendusky also testified that he was upset and embarrassed to tell his family that he had lost his job, he was forced to accept a demotion to the plumber/steamfitter position to support himself and his family, and his new job was made more difficult because his new co-workers refused to speak to him for the first three years of his return because he was returning to a union position after twenty-three years as a salaried employee. Levendusky Tr. at 274-93. Levendusky never sought treatment for any consequences he experienced from the IRIF. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Levendusky's damages for emotional distress is granted unless Levendusky files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

i. Clifford B. Meacham

Defendants contend that the jury's award of a total of $125,000.00 to plaintiff Clifford B. Meacham ("Meacham") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 37-40.

Meacham was sixty at the time of the IRIF. He received a master's degree in Computer Science and was earning approximately $63,000 annually at the time of the IRIF. He had been employed by KAPL or its parent company for over

forty-three years and planned to work until age sixty-five. Following the IRIF, Meacham found employment at another company for approximately one year at an annual salary of approximately $53,000. That employment ended in November 1997 and Meacham then moved to Florida where he has remained, supporting himself at several temporary positions and receiving his pension. Meacham Tr. (Docket No. 164) at 63-112.

The evidence of Meacham's emotional distress consisted of the testimony of Meacham and his treating psychologist that Meacham was initially dazed and bewildered after the IRIF was announced. Meacham lost self-confidence and endured the stress of uncertainty following the loss of his job. He suffered a recurrence of chronic pain in his back, neck and shoulders which he attributed to the stress from the IRIF. Meacham also suffered symptoms of depression. Meacham sought treatment from a psychologist for problems resulting from the IRIF as well as for other unrelated and preexisting issues. These consequences of the IRIF and Meacham's treatment with the psychologist were generally resolved within one to two years. Meacham Tr. at 65-66, 110-12; Nydegger Tr. (Docket No. 165).

The jury was entitled to credit the testimony of Meacham and his treating psychologist. That testimony established the emotional consequences, physical manifestations of emotional distress and medical care for that distress. On this evidence, the jury's award of $125,000.00 to Meacham for his emotional distress did not deviate materially from the maximum compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of the jury's award of damages to Meacham for emotional distress or for remittitur is denied.

j. Bruce E. Palmatier

The jury awarded plaintiff Bruce E. Palmatier ("Palmatier") back pay in the amount of $2,841.28, front pay in the amount of $13,211.05.15, and damages for emotional

distress totaling $313,232.48. Defendants contend that they are entitled to a new trial or remittitur on all such awards. Defs. Mem. of Law at 43-45, 69-70.

Palmatier was forty-nine at the time of the IRIF and was married with four children ranging in age from seven to twelve. He was employed as an electrical specialist at the time of the IRIF earning an annual salary of approximately $43,000. Palmatier had been employed by KAPL or its parent company for thirty years. Six months after the IRIF, Palmatier was rehired by KAPL as an electrician at an hourly rate of pay, a position in which he continued through the time of trial. By working substantial overtime, Palmatier earned an approximate annual income of $44,700 in the four years following the IRIF. Palmatier Tr. (Docket No. 186) at 190-228.

Defendants challenge the jury's back pay award to Palmatier on the ground that he failed to satisfy his duty to mitigate damages by failing to seek comparable employment after returning to KAPL as an electrician. Defendants argue that Palmatier's duty to mitigate damages required him to seek an exempt position rather that choosing to remain in the hourly position as Palmatier chose to reduce the likelihood that he would be selected for another IRIF. Palmatier Tr. at 230-32. First, the jury was entitled to find that the income Palmatier earned as an electrician following the IRIF was comparable, if not identical, to that which he had received as an exempt electrical specialist. Second, the reasonableness of Palmatier's decision not to pursue another exempt position for fear of another IRIF was a question for the jury. For either reason, the jury's finding that defendants failed to meet their burden of proving that Palmatier did not sufficiently mitigate his damages was supported by the evidence in the record. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion on this ground is denied.

Defendants challenge the front pay award to Palmatier on the ground that Palmatier failed to establish the absence of any prospect of obtaining comparable employment. The evidence at trial established that Palmatier, a high school graduate with college credits but no college degree, obtained a position as an electrician which was a demotion from his previous position as a specialist but comparable and, with overtime, allowed Palmatier to earn comparable pay. Whether other comparable positions existed and, if so, whether such prospects were reasonable presented questions of fact. The determination on this record either that Palmatier had already obtained comparable employment or that he had no reasonable prospect of obtaining a position more comparable to his electrical specialist position at KAPL in the foreseeable future was adequately supported by the evidence. That determination was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial or remittitur on the issue of the award of front pay to Palmatier is denied.

Finally, defendants contend that the jury's award of damages to Palmatier for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Palmatier and his wife presented the only evidence supporting his claim of emotional distress. They testified that following the IRIF, Palmatier began experiencing sleeplessness and anxiety. His personality changed significantly, including increased irritability, lack of "drive," an inability to finish projects and a diminished ability to communicate with his children leading to a deterioration of their family life. Palmatier also experienced a weight gain. Palmatier Tr. (Docket No. 186) at 194-95; Palmatier Tr. (Docket No. 187) at 295-96. These consequences had persisted through the time of trial and showed no signs of abating. *Id.* at 296.

Palmatier further testified that in order to earn income comparable to his income prior to the IRIF, he worked

substantial overtime and planned to continue doing so for the foreseeable future. Palmatier Tr. at 222-25. This causes additional stress for Palmatier. As a result, Palmatier consulted his treating physician who in August 2000 prescribed Prozac, an antidepressant. Palmatier was continuing to take Prozac at the time of trial to assist in dealing with the stress. *Id.* at 226-27.

The testimony of Palmatier and his wife adduced evidence from which the jury could conclude that the consequences of the IRIF for Palmatier had included severe stress, personality changes and the treatment which had continued for the five years since the IRIF and would continue into the foreseeable future. Given this testimony establishing the nature, severity and duration of the consequences of the IRIF, the jury could reasonably award Palmatier substantial damages for emotional distress. However, its award of $313,242.38 deviates materially from the maximum compensation of $175,000 found reasonable in other similar cases involving consequences such as the jury could find were present here. *See, e.g., Shea,* 925 F.Supp. at 1019-30. Accordingly, defendants' motion for a new trial on the issue of Palmatier's damages for emotional distress is granted unless Palmatier files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $175,000 on or before March 8, 2002.

k. Neil R. Pareene

The jury awarded plaintiff Neil R. Pareene ("Pareene") back pay in the amount of $63,050.37 and damages for emotional distress totaling $157,683.21. Defendants contend that they are entitled to a new trial or remittitur on both awards. Defs. Mem. of Law at 49-50, 67-68.

Pareene was forty-five at the time of the IRIF and was married with children. He was employed as a specialist in the position of Craft Production Supervisor at the time of the IRIF earning an annual salary of approximately $48,000. Pareene had been employed by KAPL or its parent company

for over twenty-six years. Following the IRIF, Pareene, a high school graduate, enrolled as a student at Schenectady County Community College pursuing an associate's degree in electrical technology and attended college full-time for the Spring and Fall semesters of 1996. Pareene also obtained a truck driver's license and worked as a truck driver for two different companies from May 1996 to August 1998 at hourly rates ranging from $10.00 to $12.39. Pareene was rehired by KAPL as a janitor in August 1998 at an hourly rate of approximately $17.00. In September 1999, Pareene was promoted to an hourly position as a systems operator at an hourly rate of $20.30. In the four years following the IRIF, Pareene earned an average annual salary of approximately $34,000. Pareene Tr. (Docket No. 174) at 360-408, 487-503.

Defendants challenge the jury's back pay award to Pareene on the ground that he failed to satisfy his duty to mitigate damages in two ways. First, defendants argue that Pareene's full-time attendance at college in the year following the IRIF breached his duty to mitigate damages. However, as the Second Circuit has stated:

> [T]here is no per se rule that finds inherently incompatible the duty of a ... plaintiff to use reasonable diligence in securing comparable employment and such a plaintiff's decision to attend school on a full-time basis. Rather, the central question a court must consider when deciding whether a student-claimant has mitigated her damages is "whether an individual's furtherance of his education is inconsistent with his responsibility 'to use reasonable diligence in finding other suitable employment.' " We believe that a fact-finder may, under certain circumstances, conclude that "one who chooses to attend school only when diligent efforts to find work prove fruitless" satisfies his or her duty to mitigate.

Dailey, 108 F.3d at 456-57 (citations omitted); *see also Smith v. American Serv. Co.,* 796 F.2d 1430, 1432 (11th Cir.1986) (holding that the decision to attend school full-time was "entirely reasonable" where a job search was futile and the claimant held a part-time job while in school). Thus, Pareene's decision to attend school presented a question of reasonableness for determination by the jury in light of the circumstances which he then faced. Those circumstances included efforts by Pareene to seek other employment before enrolling as a full-time student and his obtaining employment while he attended school. Thus, it cannot be said that defendants satisfied their burden of proving Pareene's failure to mitigate in this regard.

Second, defendants argue that in the Spring of 1999, Pareene declined to accept an offer of a promotion to a position more comparable to his position prior to the IRIF. However, Pareene declined the offer because it would require him to work a day shift rather than the preferred night shift to which he was then assigned. The jury was entitled to consider whether the change in shifts made the offered potion unsuitable or not comparable to Pareene's position before the IRIF. Moreover, since this offer was not made until over three years after the IRIF, the jury could at most reduce rather than deny back pay to Pareene on this ground. Thus, the offer to and declination by Pareene of this position presented a question of fact for resolution by the jury. The jury's resolution of this question was not substantially erroneous or a miscarriage of justice. Defendants' motion for a new trial on the issue of the award of back pay to Pareene is denied.

Defendants also contend that the jury's award of damages to Pareene for emotional distress was excessive and remittitur to $10,000 should be granted. Pareene presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he was shocked, angry, confused, frustrated, pained and more prone to crying. Pareene Tr. at 370-72, 502. Being told by defendants that his

skills were neither critical nor flexible led him to enroll as a full-time student to improve his skills in those areas. *Id.* at 388-90. He aspired to return to a position at KAPL as satisfying as his position at the time of the IRIF but was told upon his re-employment there that he "could never hope to go back" to his former position. *Id.* at 402. Pareene testified that he has felt a constant strain since the IRIF and that the experience was traumatic. *Id.* at 500. He has felt a constant pressure to avoid mistakes that could lead to another IRIF. *Id.* at 501. The increased overtime he is required to work in his present position also place an additional strain on him. *Id.* at 496.

Pareene's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF. However, that distress did not include significant physical manifestations or require treatment. Thus, the jury's award of $157,683.21 deviates materially from the maximum compensation of $125,000 found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Pareene's damages for emotional distress is granted unless Pareene files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

l. William C. Reynheer

The jury awarded plaintiff William C. Reynheer ("Reynheer") damages for back pay, front pay and emotional distress totaling $935,617.41. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 34-37, 63-65.

Reynheer was fifty-six at the time of the IRIF and was married with two adult children. He had received a bachelor's degree in engineering and was employed as an engineer at the time of the IRIF earning an annual salary of approximately $65,400. Reynheer had been employed by KAPL or its parent company for over twenty-six years.

Following the IRIF, Reynheer sought unsuccessfully to obtain an engineering position. He then received training to become a truck driver and unsuccessfully sought a position as a truck driver after obtaining a license. In response to a newspaper advertisement, Reynheer then obtained a position as an automobile salesman in September 1996, earning approximately $1,000 monthly. Reynheer was rehired by KAPL as a janitor on November 8, 1996 at an approximate annual income of $30,000. In November 1997, Reynheer was promoted to a position as a technician at an approximate annual income of $35,000. In the four years following the IRIF, Reynheer earned an average annual income of approximately $40,000. Reynheer Tr. (Docket No. 167) at 758-879.

Defendants challenge the jury's back pay award of $179,740.17 to Reynheer on the ground that he failed to satisfy his duty to mitigate damages when he failed to seek other engineering positions after his re-employment by KAPL in November 1996. Reynheer testified at length about his unsuccessful efforts to seek comparable employment prior to his re-employment at KAPL and about his efforts to obtain better positions within KAPL after his return. Whether Reynheer's testimony was credible and his efforts to find comparable employment reasonable were questions for the jury. On this record the jury was entitled to find that defendants had not satisfied their burden of proving that Reynheer failed to mitigate his damages. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion for a new trial on the issue of the jury's award of back pay to Reynheer is denied.

Defendants challenge the front pay award to Reynheer of $102,380.00 on the grounds that Reynheer failed to establish the absence of any prospect of obtaining comparable employment. The evidence at trial established that Reynheer made diligent efforts for the first year after the IRIF to find employment as an engineer without success and that he made

efforts to find employment as an engineer within KAPL after his re-employment there. From Reynheer's diligent but unsuccessful efforts prior to trial, the jury was entitled to find that there were no reasonable prospects for Reynheer to obtain a position as an engineer in the future. Defendants' motion on this ground is denied.

Finally, defendants contend that the jury's award of damages of $653,497.24 to Reynheer for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Reynheer presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he felt as he had on the occasions when he learned his parents had died. Reynheer Tr. at 758. Reynheer became depressed and "vegetative." *Id.* at 761. A pre-existing condition of high blood pressure was exacerbated and required an adjustment in his medication. *Id.* at 762. He experienced sleeplessness and his drinking increased. He became irritable and withdrew from family and friends. He ceased exercising as he had before the IRIF. *Id.* at 761-62, 774-75. Reynheer further testified, however, that these consequences largely disappeared by the end of 1996 when he returned to work at KAPL although he has continued to suffer episodes of depression less than once a month related to the IRIF. *Id.* at 763-75. Reynheer never sought treatment for any of these consequences. Reynheer also testified that he felt acute humiliation after returning to KAPL as a janitor and for the year he remained in that position. He would regularly see his former co-workers as he performed his duties, but they avoided contact with him. *Id.* at 841-42.

Reynheer's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF. However, that distress did not include significant physical manifestations or require treatment. In these circumstances, the jury's award of $653,497.24 deviates materially from the maximum compensation of $125,000 found reasonable in other similar

cases. Accordingly, defendants' motion for a new trial on the issue of Reynheer's damages for emotional distress is granted unless Reynheer files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

m. John K. Stannard

The jury awarded plaintiff John K. Stannard ("Stannard") back pay in the amount of $58,242.97 and damages for emotional distress totaling $140,803.46. Defendants contend that Stannard's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 57-60, 66-67.

Stannard was forty-seven at the time of the IRIF and was married with one son then in his second year of college. Stannard was employed as a maintenance engineering specialist at the time of the IRIF earning approximately $49,000 annually. Stannard had been employed by KAPL for over twenty-seven years. On February 2, 1996, Stannard was rehired by KAPL as a janitor at an hourly rate at which he earned an average of $35,300 annually over the next four years. Stannard Tr. (Docket No. 186) at 25-66.

Defendants argue that because Stannard failed to seek other employment either inside or outside KAPL after his return to KAPL, he failed to satisfy his obligation to mitigate damages and, therefore, was not entitled to an award for back pay. However, Stannard, who has an associate's degree, testified that he searched for other comparable employment immediately following the IRIF before applying for and accepting the position at KAPL. Stannard Tr. at 42-43. Stannard further testified that since his return to KAPL, he has continued to check the listings of job openings within KAPL as well as in local newspaper and on the Internet but has seen no listings for a position comparable to his former position for which he might be qualified. *Id.* at 55-57. The jury was entitled to find from Stannard's re-employment and the results of Stannard's search for other positions that

defendants had failed to meet their burden of proving that Stannard failed to mitigate his damages and that Stannard's efforts in these circumstances were reasonable. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants motion on this ground is denied.

The evidence of Stannard's emotional distress consisted solely of Stannard's testimony that he felt betrayed, devastated and angry when told that he had been selected for the IRIF. Stannard experienced sleeplessness and weight loss following the IRIF and felt run down. Stannard Tr. at 25-29. The stress of the IRIF also caused high blood pressure, an aggravation of a pre-existing back problem, a sinus infection and dental problems. *Id.* at 29-30. Stannard also experienced trigeminal neuralgia.[36] These problems persisted in diminished degree to the time of trial. *Id.* at 35. The uncertainty caused by the IRIF caused Stannard's son to withdraw from college. *Id.* at 62-66. In these circumstances and given the physical manifestations experienced by Stannard, the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $175,000. *See Shea,* 925 F.Supp. at 1019-30. Therefore, because the award to Stannard does not exceed that figure, defendants' motion for a new trial or remittitur on the issue of Stannard's damages for emotional distress is denied.

n. Allen G. Sweet

Defendants contend that the jury's award of a total of $128,953.46 to plaintiff Allen G. Sweet ("Sweet") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 53-55.

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[36] A disorder of the nervous system causing "excruciating episodic [facial] pain in the area supplied by the trigeminal nerve." Dorland's Illustrated Medical Dictionary 1127 (28th ed.1994).

Sweet was sixty-three at the time of the IRIF. He was a specialist at that time with an annual salary of approximately $50,000. He had been employed by KAPL or its parent company for over thirty years. Sweet was married and had received a high school equivalency degree. Following the IRIF, Sweet was unable to find other suitable employment and began collecting his pension from KAPL. Sweet Tr. (Docket Nos. 172, 173) at 21-44.

The evidence of Sweet's emotional distress consisted of the testimony of Sweet and his wife that he was shocked, embarrassed and humiliated by the IRIF, he has suffered sleeplessness since the IRIF, he lost approximately forty pounds, and he was ashamed and withdrew from friends, *Id.* at 27-30, 44, 114-18. The sleeplessness and weight loss continued to the time of trial. *Id.* at 117-18. Sweet never required treatment for any consequences of the IRIF. On this record, the jury's award of $128,953.46 exceeded the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Sweet's damages for emotional distress is granted unless Sweet files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.[37]

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[37] The jury's award deviates from what has been found herein to be the maximum reasonable compensation in other cases by less than $4,000, or approximately three percent. Little guidance is found as to whether such a deviation is "material" under the HRL. However, since the figure of $125,000 has been determined to be the *maximum* reasonable compensation in such circumstances, the deviation here is deemed material.

o. David W. Townsend

Plaintiff David W. Townsend ("Townsend") was awarded damages for back pay, front pay and emotional distress totaling $379,356.09. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 56-57, 70-71.

Townsend was forty-six at the time of the IRIF and was married with two school-age children. He had received an associate's degree and was employed as a specialist at the time of the IRIF earning an annual salary of approximately $40,500. Townsend had been employed by KAPL for over twenty-five years. In May 1996, Townsend obtained employment at another company as a laborer at an hourly rate of $14.50 and was later promoted to a position paying an hourly rate of $16.00. In October 1996, Townsend was rehired by KAPL as a janitor and was promoted in February 1998 to a position as irradiation technician where he has since remained at a current current annual income of $43,300. Townsend Tr. (Docket Nos. 1188, 189) at 583-646.

Defendants challenge the jury's back pay award of $18,126.82 on the ground that Townsend failed to satisfy his duty to mitigate damages when he failed to seek other comparable specialist positions after his promotion to the technician position at KAPL in February 1998. Defendants' argument fails for two reasons. First, while not identical in duties or pay to the specialist position, the technician position was sufficiently comparable in duties and pay to satisfy Townsend's duty to mitigate damages. For example, Townsend's annual salary at the time of the IRIF as a specialist was approximately $40,500 while his annual income in the technician position at the time of trial was approximately $43,300. Townsend Tr. at 580, 642. Second, defendants contend that Townsend's failure to mitigate commenced with his promotion to the technician position in February 1998 but do not appear to contend that his efforts for the two prior years were deficient. In these circumstances

a question of fact was presented for resolution by the jury as to what extent, if any, the back pay award to Townsend should be reduced for any such limited failure to mitigate. The jury's award here was supported by the evidence in the case. The award was not substantially erroneous or a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of the jury's award of back pay to Townsend is denied.

Defendants challenge the front pay award to Townsend of $25,121.50 on the ground that Townsend failed to establish the absence of any reasonable prospect of obtaining comparable employment. The evidence at trial established that Townsend made diligent efforts for two years after the IRIF to find employment comparable to the specialist position he held at the time of the IRIF without success and that the technician position he ultimately obtained at KAPL was sufficiently comparable, if not identical, to the specialist position to satisfy Townsend's burden of demonstrating the absence of reasonable prospects of obtaining more comparable employment. Townsend's education, age and unsuccessful efforts to obtain more comparable employment for over two years prior to February 1998 could also be considered. On this record, therefore, defendants' motion for a new trial on the issue of the award of front pay to Townsend must be denied.

Finally, defendants contend that the jury's award of damages of $336,107.77 to Townsend for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Townsend presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he was shocked, depressed, irritable and "not able to function properly." Townsend Tr. at 584-89. Townsend stated that he suffered sleeplessness which has continued since the IRIF. *Id.* at 590. Townsend further testified that he began suffering acidic stomach pains following the IRIF which have continued to date and for

which his doctor prescribed medication. *Id.* at 591-92. Townsend also testified that he experienced episodes of chest pains from the stress of the IRIF which caused him to seek treatment. *Id.* at 592-93. The manual labor position Townsend found immediately after the IRIF caused a hernia which required surgery. *Id.* at 618.

Townsend's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF which will continue in the future. It also established that this included significant physical consequences requiring treatment. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $175,000. *See, e.g. Shea,* 925 F.Supp. at 1019-30. Therefore, defendants' motion for a new trial on the issue of Townsend's damages for emotional distress is granted unless Townsend files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $175,000 on or before March 8, 2002.

p. Carl T. Woodman

Plaintiff Carl T. Woodman ("Woodman") was awarded damages for back pay, front pay and emotional distress totaling $398,188.70. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 45-46, 69.

Woodman was forty-five at the time of the IRIF and was married. He had received an associate's degree in business administration and was employed as a specialist in nondestructive testing at the time of the IRIF earning an annual salary of approximately $47,000. Woodman had been employed by KAPL or its parent company for over twenty-five years. In September 1996, Woodman was rehired by KAPL as a janitor at an hourly rate of $16.00. Woodman left that position for one as a field inspector at another company at an hourly rate of $17.00. Woodman's employment there was terminated in the Summer of 1998. He was then rehired

by KAPL in November 1998 as a nondestructive tester, where he remains, at an hourly rate from which he received an approximate annual income of $49,000. Woodman Tr. (Docket Nos. 179, 180) at 60-141.

Defendants challenge the jury's back pay award of $33,920.18 to Woodman on the ground that he failed to satisfy his duty to mitigate damages by failing to seek other comparable specialist positions after his re-employment at KAPL in 1998. Defendants' argument fails for three reasons. First, while not identical in duties or pay to the specialist position Woodman held at the time of the IRIF, the jury could reasonably have found that the position as a tester was sufficiently comparable in duties and pay to satisfy Woodman's duty to mitigate damages. For example, Townsend's annual salary at the time of the IRIF as a specialist was approximately $47,000 while his annual income in the position as a tester at the time of trial was approximately $49,000. Woodman Tr. at 55, 140. Second, Woodman testified that he in fact made efforts to find other employment after November 1998. *Id.* at 136-39. The jury could conclude from such testimony that Woodman in fact satisfied his duty to mitigate damages. Third, defendants contend that Woodman's failure to mitigate commenced with his re-employment at KAPL in November 1998 but do not appear to contend that his efforts for the nearly three prior years were deficient. In these circumstances a question of fact was presented for resolution by the jury as to what extent, if any, the back pay award to Woodman should be reduced for any such limited failure to mitigate. The jury's award here is supported by the evidence in the case. That award was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of the jury's award of back pay to Woodman is denied.

Defendants challenge the front pay award to Woodman of $42,344.21 on the ground that Woodman failed to establish the absence of any reasonable prospect of obtaining

comparable employment. The evidence at trial established that Woodman made diligent efforts for the five years after the IRIF to find employment comparable to the specialist position he held at the time of the IRIF without success and that the position of tester he ultimately obtained at KAPL was sufficiently comparable, if not identical, to the specialist position to satisfy Woodman's burden of demonstrating the absence of reasonable prospects of obtaining more comparable employment. Woodman's education and age could also be considered in determining whether there existed any reasonable prospect that he would obtain more comparable employment in the future. On this record, therefore, defendants' motion for a new trial on the issue of the award of front pay to Woodman must be denied.

Finally, defendants contend that the jury's award of damages of $321,924.31 to Woodman for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Woodman presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he felt scared, ashamed and betrayed. Woodman Tr. at 60-64. Woodman stated that he suffered sleeplessness and that he has remained scared, irritable, anxious about the future and paranoid since the IRIF. *Id.* at 140-41. Woodman sought no treatment for any of these consequences of the IRIF. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Woodman's damages for emotional distress is granted unless Woodman files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

IV. Plaintiffs' Motions

Plaintiffs seek awards of prejudgment interest, postjudgment interest, an upward adjustment of the judgment

in light of plaintiffs' increased tax liabilities, and attorneys' fees and costs.

A. Prejudgment Interest

Plaintiffs seek an award of prejudgment interest for the damages awarded for back pay and for past emotional distress for the period from the effective date of the IRIF, January 12, 1996, through the date of the judgment on the jury's verdicts, December 5, 2000. Pls. Mem. of Law (Docket No. 141) at 4-6. Defendants do not oppose an award of prejudgment interest for back pay or the methodology proposed by plaintiffs for calculating prejudgment interest, but defendants oppose any award of prejudgment interest for the awards for past emotional distress. Defs. Mem. of Law (Docket No. 201) at 2-4. Therefore, without objection, plaintiffs' motion for an award of prejudgment interest on the back pay awards is granted for the period from January 12, 1996 through December 5, 2000, and such interest shall be calculated by (1) dividing the back pay awards evenly over the period from January 12, 1996 through December 5, 2000; (2) the average annual United States Treasury bill rate of interest referenced in 28 U.S.C. § 1961 shall then be applied to each component period; and (3) the interest shall be compounded annually. *See Hogan,* 144 F.Supp.2d at 141; *Stratton v. Department for the Aging for the City of N.Y.*, No. 91 Civ. 6623(SAS), 1996 WL 352009, at *4 (S.D.N.Y. June 25, 1996).

Defendants oppose plaintiffs' motion for an award of prejudgment interest for the awards of damages for past emotional distress. Plaintiffs contend that such an award should be made to insure that plaintiffs are made whole. *See Robinson v. Instructional Sys., Inc.*, 80 F.Supp.2d 203, 207 (S.D.N.Y.2000) ("courts also exercise their discretion to award prejudgment interest on compensatory damage awards when interests of fairness and full compensation to the plaintiff so require"). However, for two reasons, plaintiffs' motion for prejudgment interest on the awards for past emotional distress is denied.

First, prejudgment interest is generally awarded "to compensate the plaintiff for loss of the use of money wrongfully withheld through an unlawful discharge." *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 281 (2d Cir.1987). Unlike the awards for back pay, the awards here for past emotional distress did not compensate plaintiffs for any money withheld as the result of the IRIF but for emotional injuries suffered as a result thereof. Thus, prejudgment interest on those awards is not required to insure that plaintiffs are made whole in that regard.

Second, the awards for past emotional distress were made under the HRL. New York courts generally hold that prejudgment interest is unavailable for awards for past emotional distress. *See Campbell v. Metropolitan Property & Cas. Ins. Co.*, 239 F.3d 179, 186-87 (2d Cir.2001); *Miller v. Santoro*, 227 A.D.2d 534, 535, 643 N.Y.S.2d 168 (2d Dep't 1996) (correcting judgment which erroneously awarded preverdict interest for conscious pain and suffering); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 176 Misc.2d 325, 333, 672 N.Y.S.2d 230 (1997) ("courts of New York State have consistently held that pre-verdict interest is *not* available on an award of compensatory damages") (emphasis in original); *see also* N.Y. C.P.L.R. § 5001(a) (McKinney Supp.2001).

Therefore, both because considerations of fairness do not support an award of prejudgment interest for past emotional distress here and because plaintiffs' awards for past emotional distress were made under the New York HRL and New York law does not authorize prejudgment interest for such awards, plaintiffs' motion for prejudgment interest on their awards for past emotional distress is denied.

B. Postjudgment Interest

Plaintiffs seek an award of postjudgment interest pursuant to 28 U.S.C. § 1961 on all amounts awarded from December 5, 2000, the date the amended judgment was filed, until the judgment is satisfied. Pls. Mem. of Law at 6-7.

Defendants do not oppose this motion. Accordingly, plaintiffs' motion is granted and plaintiffs are granted postjudgment interest on all amounts awarded from December 5, 2000 to the date the judgment is satisfied.

C. Upward Adjustment for Increased Taxes

Plaintiffs also seek an upward adjustment of their awards to offset what they contend are adverse tax consequences from the lump sum awards. Pls. Mem. of Law at 7-8. Plaintiffs rely on the only case which research reveals has awarded such an adjustment. *See O'Neill v. Sears, Roebuck & Co.*, 108 F.Supp.2d 443, 446-48 (E.D.Pa.2000). However, plaintiffs offered no evidence on any claimed adverse tax consequences at trial. Moreover, the evidence offered in support of this motion fails to demonstrate any such adverse consequence. Plaintiffs offer only a proposed methodology for calculating such tax consequences[38] and a conclusory "demonstration" of that methodology as to plaintiff Reynheer which would result in an upward adjustment of Reynheer's award by approximately sixty-five to eighty-five percent.[39] No basis for this conclusion is provided and, therefore, plaintiffs' "demonstration" is unduly speculative. Finally, the *O'Neill* case provides the only authority for such an upward adjustment, but that case acknowledged that it stood alone, it has yet to be followed by any other court and it limited its upward adjustment to an award for back pay and front pay but not damages for emotional distress, a limitation plaintiffs

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[38] *See* Barry Ben-Zion, *Neutralizing the Adverse Tax Consequences of a Lump-Sum Award in Employment Cases*, 13 J. of Forensic Econ. 233 (2000).

[39] According to plaintiffs' counsel, Reynheer's award of $1,115,357.58 should be adjusted upward by $948,054. Pls. Mem. of Law at 8. According to plaintiffs' economist, that award should be adjusted upward by $718,341. Riccardi Aff. (Docket No. 140) at ¶ 10.

ignore here. In these circumstances plaintiffs' motion for an upward adjustment must be denied.

D. Attorneys' Fees and Costs

Plaintiffs seek attorneys' fees and costs totaling $1,037,818.08 for those fees and costs incurred through November 22, 2000[40] when the jury returned its last verdict. Docket No. 197. Such fees and costs are sought under the ADEA against defendants KAPL and Lockheed Martin. The ADEA mandates an award of reasonable attorneys' fees and costs to a prevailing plaintiff to the extent authorized by the Fair Labor Standards Act, 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b); *Lightfoot,* 110 F.3d at 913. "The operative term is 'reasonable.'" *Tanzini,* 978 F.Supp. at 82.

1. Attorneys' Fees

Plaintiffs seek a total of $979,348.71 in attorneys' fees. To determine the reasonable amount of attorneys' fees, a court must first multiply the number of hours expended by a plaintiff's attorney in prosecuting a case by the reasonable hourly rate charged by the attorney to establish a "lodestar" figure. *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Certain adjustments may then be made to this lodestar figure to arrive at a final award. *Tanzini,* 978 F.Supp. at 83-84. Here, plaintiffs seek an award for fees charged by three attorneys, a law clerk who was admitted to practice as an attorney during the pendency of this case, and three paralegals.

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[40] Plaintiffs' motion concerns fees and costs incurred to the date of the last verdict. Plaintiffs' counsel have incurred additional fees and costs since that date, *inter alia,* in responding to defendants' posttrial motions. Accordingly, plaintiffs are granted leave to file a supplemental motion for attorneys' fees and costs incurred subsequent to November 22, 2000.

a. Hours Expended

Plaintiffs contend that their attorneys and staff expended a total of 6,935 hours in prosecuting this case. DuCharme Aff. (Docket No. 197) at Exs. A-E. Defendants challenge the hours claimed in several respects.

Plaintiffs assert that the hours claimed do not include any hours expended in prosecuting the claims of (a) the two plaintiffs for whom the jury returned a verdict in favor of defendants, or (b) the eight plaintiffs who settled their claims following the liability phase of the trial.[41] *Id.* at ¶ ¶ 6-8. Defendants generally accept the method by which plaintiffs excluded hours expended on the claims of these ten plaintiffs. Defs. Mem. of Law (Docket No. 201) at 15-16. However, defendants contend that there should be further exclusions where plaintiffs' records indicate that the attorneys' time was devoted exclusively to one or more of the ten defendants and where plaintiffs' exclusion of time did not sufficiently reflect the portion of that time devoted to on or more of the ten plaintiffs. *Id.* at 16-17 & nn. 7, 8. The total fees claimed for such entries in plaintiffs' records is $4,175.52. A review of plaintiffs' records confirms defendants' contention in whole regarding those instances where the entire billing entry was devoted to one or more of the ten plaintiffs. *See* Defs. Mem. of Law at 16 n. 7. However, where a billing entry was devoted in one-half to one of the ten plaintiffs, a review of the records indicates that defendants are incorrect as to one such entry and that the reduction sought was miscalculated as to the others. *See id.* at 17 n. 8. Therefore, the lodestar figure will be reduced on this account by a total of $3,412.52.

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[41] A ninth plaintiff, Christine A. Palmer, settled her claims after plaintiffs filed this motion. *See* note 12 *supra*. The extent to which, if at all, the hours expended by plaintiffs' counsel should be adjusted because of that settlement is unclear. Accordingly, this motion is considered without adjustment for the Palmer settlement.

Defendants challenge several categories of the hours claimed on the ground that such hours were redundant and unnecessary. Defs. Mem. of Law at 17-19; *see Hensley,* 461 U.S. at 432, 103 S.Ct. 1933; *Orchano v. Advanced Recovery, Inc.,* 107 F.3d 94, 97 (2d Cir.1997). First, defendants contend that three meetings with plaintiffs attended by all three of plaintiffs' attorneys and for which all three attorneys billed their full hourly rate was unnecessary. Defs. Mem of Law at 17-18. However, while it may generally hold that one attorney will suffice to provide services in most instances, there may arise certain situations at critical junctures of cases which require the attendance and participation of two or more attorneys. In these three instances, the three attorneys attended meetings at the outset of the case with various plaintiffs to obtain information and assess the potential of the case. Given the number of plaintiffs, the complexity of the case and the impact of a commitment to accept this case to a law firm like that of plaintiffs' counsel with only three attorneys, these early meetings were sufficiently important that the attendance of all three attorneys was not unreasonable. Accordingly, the hours claimed by all three attorneys for these meetings will be allowed.

Defendants also contend that in twelve instances, two or more of plaintiffs' attorneys billed for attendance at certain depositions. Defs. Mem. of Law at 18 (specifying the instances). A review of those twelve instances indicates that six of those instances actually involved meetings among plaintiffs' attorneys and the other six involved the depositions of key KAPL officers and employees. Meetings among counsel to review and discuss developments in the case were essential and, therefore, reasonable. Defendants have not suggested, nor does it appear from the billing records of plaintiffs' counsel, that such meetings were held with excessive frequency. As to the depositions, the attendance of two attorneys at a single deposition is not unreasonable as a matter of law. *See Hogan,* 144 F.Supp.2d at 141 (holding in age discrimination case where two attorneys attended

depositions on behalf of four plaintiffs that "[i]n light of the complexity of this case and the fact that [the prevailing plaintiff] was suing ... a large company with significant resources at its disposal, the use of two attorneys was not unnecessary or unreasonable"); *Coffey v. Dobbs Int'l Servs., Inc.*, 5 F.Supp.2d 79, 86 (N.D.N.Y.1998), *rev'd on other grounds*, 170 F.3d 323 (2d Cir.1999). The attendance of two attorneys for plaintiffs at depositions appears to have been limited to such important witnesses as only one attorney generally attended depositions for plaintiffs. In the circumstances of this case, it was not unreasonable for two attorneys to attend those particular depositions. Accordingly, the hours claimed by plaintiffs' counsel will not be reduced in these instances.

Defendants also contend that the hours claimed should be reduced by the hours claimed for consultation with an expert witness who was never retained or called to testify by plaintiffs. Defs. Mem. of Law at 19 & n. 9. However, it was not unreasonable for plaintiffs to explore the possibility of calling other expert witnesses as case preparations proceeded and the time expended in this regard was not excessive. Defendants further contend that time expended in drafting a letter to the DOE after the liability phase and before the damages phase and time expended in that period for legal research on liability after liability had been found by the jury were unnecessary. *Id.* at 19. However, settlement discussions between the parties were ongoing in this period, the records of the DOE being sought in the letter were potentially relevant to both settlement and the damages phase of the trial, and the legal research on liability was likewise useful to plaintiffs in their settlement discussions both as to damages awarded in disparate impact cases and to refute defendants' continuing assertions that the evidence did not support the verdict on liability. Thus, the hours claimed in these instances were not unreasonable and will not be reduced.

Finally defendants point out what appears to be a billing error in the duplicate entries for March 26 and 27, 1998. Defs. Mem. of Law at 19. The entries are identical in all respects and only one such charge is reasonable. Accordingly, the lodestar will be reduced by a total of $218.59 for the duplication of charges in this instance.

b. Hourly Rates

With one exception, the hourly rates claimed by plaintiffs' counsel are within the range of those previously found reasonable in this district, defendants take no issue with those rates and the rates claimed are allowed. The exception concerns Kimberly Ann Harp. Harp began work on this case for plaintiffs' counsel in 1997 when she was a second-year law student. DuCharme Aff. at ¶ 36. She continued to provide legal services throughout this case, including after her graduation from law school and admission to the bar in 1999. Plaintiffs claim hourly rates of $90-$100 throughout the case for work performed by Harp. Defendants do not challenge that rate for work performed after Harp was admitted to the bar but contend that the rate is excessive for work performed prior to that time. Defs. Mem. of Law at 14-15. Defendants contend that Harp's hourly rate should be no more that $65 prior to her admission to the bar. *See John S. v. Cuomo,* No. 90-CV-294 (NPM), 1999 WL 592693, at *2 (N.D.N.Y. July 29, 1999) (McCurn, J.) (awarding hourly rate of $65 for law student work). Defendants' contention finds support in the cases decided in this district. *See, e.g., id.; Hannigan v. Board of Educ. of Brunswick Sch. Dist.,* No. 95-CV-1435 (FJS), 1997 WL 10971, at *3 (N.D.N.Y. Jan. 9, 1997) (Scullin, J.) (awarding hourly rate of $50 for law student work). Recalculating the amounts claimed by plaintiffs at the lower hourly rate for Harp requires that the lodestar fugure claimed by plaintiffs be reduced by a total of $4,753.05.

Reducing the lodestar figure of $979,348.71 claimed by plaintiffs by the three amounts described above yields a total lodestar figure of $970,964.55.

c. Adjustments

There exists "a 'strong presumption' that the lodestar represents the 'reasonable' fee." *City of Burlington v. Dague,* 505 U.S. 557, 561, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)). Adjustments may be made to the lodestar figure for various reasons, but the party seeking such an adjustment bears the burden of establishing its reasonableness. *See id.* (citing *Blum v. Stenson,* 465 U.S. 886, 898, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)).

Plaintiffs contend that the lodestar figure should be adjusted upward in an unspecified amount given various factors present in this case, including the novelty and difficulty of the issues, the skill required to represent the plaintiffs successfully and the result obtained. Pls. Mem. of Law at 5 (citing *Hensley,* 461 U.S. at 434, 103 S.Ct. 1933). There is no question that plaintiffs' counsel demonstrated uncommon skill in prosecuting this case on behalf of twenty-eight plaintiffs against defendants with substantial resources and themselves represented by skilled counsel. The result obtained for the plaintiffs was also unqualifiedly successful. However, the lodestar figure reasonably reflects not only the time, effort, resources and skill required of plaintiffs' counsel in this case but bears a reasonably proportionate relationship to the result obtained. Accordingly, plaintiffs have failed to meet their burden of demonstrating that the lodestar figure should be adjusted upward.

Defendants contend that the lodestar figure should be adjusted downward by fifty percent in light of plaintiffs' limited success in prevailing on the disparate impact theory but not on the disparate treatment theory. Defs. Mem. of Law at 19-24. As noted above, the lodestar figure includes

downward adjustments for the jury's verdict in favor of defendants as to two plaintiffs and the settlement of the claims of eight other plaintiffs. Defendants, therefore, seek the downward adjustment here solely on the ground of the jury's rejection of the disparate treatment theory.

The lodestar figure may be adjusted downward where a plaintiff prevailed on certain claims but not on others. However, no reduction on this ground should be made "if the successful and unsuccessful claims are 'inextricably intertwined' and 'involve a common core of facts or [are] based on related legal theories.' " *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1183 (2d Cir.1996) (quoting *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1259 (2d Cir.1987)); *Hogan*, 144 F.Supp.2d at 141; *Tanzini*, 978 F.Supp. at 83. Thus, "[s]o long as the plaintiff's unsuccessful claims are not 'wholly unrelated' to the plaintiff's successful claims, hours spent on the unsuccessful claims need not be excluded from the lodestar amount." *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir.1994) (quoting *Grant v. Martinez*, 973 F.2d 96, 101 (2d Cir.1992)).

The determination whether successful and unsuccessful claims bear a sufficiently close relationship that no downward adjustment for limited success should be made is necessarily informed by the facts of each case. However, courts have held in other cases that, for example, claims of age discrimination and retaliatory discharge were inextricably intertwined, *see Dominic*, 822 F.2d at 1259; claims of sexual harassment, sex discrimination, retaliation and age discrimination were inextricably intertwined, *Greenbaum v. Svenska Handelsbanken, N.Y.*, 998 F.Supp. 301, 306 (S.D.N.Y.1998); and claims of a failure to promote and wrongful termination, both based on age and disability discrimination, were inextricably intertwined. *Tanzini*, 978 F.Supp. at 84.

Here, plaintiffs' claims of age discrimination were asserted on the alternative theories of disparate treatment and

disparate impact. The two theories are closely related. Moreover, the preparation and trial on the two theories involved the discovery and testimony of virtually all the same witnesses regarding how the individual plaintiffs were treated in the IRIF and whether there existed reasonable alternatives to the IRIF. Moreover, plaintiffs' claim that defendants acted willfully involved virtually identical evidence under either theory. Given the inherently close relation of the two theories, the fact that the evidence concerning the two theories substantially overlapped in this case and the "common core of facts" underlying the two theories, it cannot be said that the two theories were wholly unrelated.

Nevertheless, to a minimal degree the preparation and trial of the two theories required plaintiffs' counsel to devote time to the unsuccessful disparate treatment theory. A reduction of ten percent to account for such time appears appropriate. *See Greenbaum,* 998 F.Supp. at 307 (reducing fee by ten percent where successful and unsuccessful claims inextricably intertwined); *Dailey,* 915 F.Supp. at 1331 (reducing lodestar figure by ten percent). Thus, the lodestar figure will be reduced on this ground by $97,096.46.

For the reasons set forth above, plaintiffs are awarded attorneys' fees in the total amount of $873,868.09.

2. Costs

Plaintiffs also move for an order awarding them costs totaling $58,469.37 incurred in the litigation of this case. Pls. Mem. of Law at 6. As prevailing parties, plaintiffs are entitled to recover taxable costs pursuant to 28 U.S.C. § 1920 and "all reasonable out-of-pocket expenses that are normally charged to clients." *O'Grady v. Mohawk Finishing Prods., Inc.,* No. 96-CV-1945, 1999 WL 30988, at *7 (N.D.N.Y. Jan. 15, 1999) (Scullin, J.); *see also LeBlanc-Sternberg v. Fletcher,* 143 F.3d 748, 763 (2d Cir.1998); *Hogan,* 144 F.Supp.2d at 143. Ordinary overhead expenses are not recoverable. *LeBlanc-Sternberg,* 143 F.3d at 763. Whether a particular item constitutes ordinary overhead or an awardable

cost depends on whether the item is one normally absorbed within the attorney's fee or separately charged to a client. *See id.* Defendants challenge various costs claimed by plaintiffs.

a. Fees for the Depositions of Defendants' Experts

Plaintiffs seek a total of $7,350.00 for fees paid to defendants' two expert witnesses as fees for their depositions. DuCharme Aff., Ex. F at 4. Such costs are those incurred in obtaining discovery, such as the costs of a stenographer or a witness' travel, and are normally charged to a client. Accordingly, plaintiffs are awarded such costs.

b. Computerized Research

Plaintiffs seek an award of $350.18 for computer research. DuCharme Aff., Ex. F at 2-7. Such costs are not compensable on this record. *See United States ex rel. Evergreen Pipeline Constr. v. Merritt-Meridian Constr. Corp.*, 95 F.3d 153, 173 (2d Cir.1996); *Tanzini*, 978 F.Supp. at 85 (holding that costs of computer research not compensable "in the absence of an hour/rate showing by plaintiff"). Accordingly, the costs claimed by plaintiffs will be reduced by $350.18.

c. Supplies

Plaintiffs seek $458.23[42] for exhibit tabs and binders. Defs. Mem. of Law at 9 & n. 4. Such costs constitute routine office overhead and are not compensable here. The amount of $458.23 will be deducted from the costs claimed by plaintiffs.

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[42] Plaintiffs claim $297.05 for "copying and exhibit binders" on 9/9/00. DuCharme Aff., Ex. F at 6. In the absence of itemization, this charge is divided evenly between copying and binders.

d. Photocopies

Plaintiffs seek a total of $24,438.00 for photocopying 97,752 pages of documents in this case, a rate of $.25 per page. DuCharme Aff., Ex. F at 7. Defendants challenge both the sufficiency of the documentation for this claim and the page rate of $.25 claimed by plaintiffs. Defs. Mem. of Law at 9-10.

Plaintiffs' description of this item states in total as follows: "12/15/00-Copy charge at $.25 per sheet x 97,752 sheets-$24,438.00." No supporting documentation or affidavit describing this claim is included. While the documents and, therefore, the photocopying in this case was substantial, it cannot be determined from plaintiffs' submissions whether a portion of the photocopying claimed was for the convenience of counsel or the plaintiffs or was otherwise unnecessary to the litigation.[43] Accordingly, the number of photocopies for which plaintiffs claim reimbursement will be reduced to 75,000. *See Baker v. Power Securities Corp.*, 174 F.R.D. 292, 295 (W.D.N.Y.1997) (reducing amount claimed for photocopying costs for insufficient documentation).

Plaintiffs claim photocopying costs at the rate of $.25 per page. Plaintiffs have submitted no supporting documentation for this rate in the form of rates normally charged in this region for outside or in-office copying or the rate plaintiffs' counsel normally charged its clients for photocopying. Other courts have found photocopying rates of $.10 per page appropriate. *See, e.g., Hogan,* 144 F.Supp.2d at 144; *Rodriguez ex rel. Kelly v. McLoughlin,* 84 F.Supp.2d 417, 426 (S.D.N.Y.1999); *In re Towers Fin. Corp. Noteholders Litigation,* No. 93CIV.0810 (WK)(AJP), 1997 WL 5904, at *1 (S.D.N.Y. Jan. 8, 1997). Multiplying 75,000 pages by

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[43] A reduction for that portion of the costs attributable to the ten plaintiffs who did not prevail or have settled their claims is discussed *infra* at subsection h.

$.10 yields a compensable total of $7,500.00. Accordingly, the costs claimed by plaintiffs will be reduced by $16,938.00.

e. Parking

Plaintiffs seek $515.00 for parking fees incurred by their counsel in attending depositions and court proceedings. *See, e.g.*, DuCharme Aff., Ex. F at 4-7. Defendants contend that such fees are not recoverable. Parking fees are recoverable as litigation costs. *See Kuzma v. I.R.S.*, 821 F.2d 930, 933 (2d Cir.1987) (holding that parking fees "clearly represent the reasonable costs of litigation and are recoverable"). Accordingly, plaintiffs' claim for parking fees will be allowed.

f. Court-Ordered Payment to Defendants' Expert Witness

Before trial, a schedule was established for the parties to file motions in limine, including any motions regarding expert witnesses. *See, e.g.*, Docket No. 53 (defendants' motion in limine to preclude plaintiffs' expert witness). Plaintiffs made no such motion. During the liability phase, defendants called Dr. Frank Landy, an industrial psychologist, who had previously been disclosed to plaintiffs, to testify as an expert witness. Plaintiffs' counsel for the first time moved to preclude Dr. Landy's testimony. Dr. Landy's testimony was then postponed to permit plaintiffs and defendants to submit briefs on the issue. Docket Nos. 82, 83. As a consequence of their untimely motion, plaintiffs were ordered to reimburse defendants for the costs incurred in Dr. Landy's postponed appearance. Plaintiffs thereafter reimbursed defendants in the amount of $4,196.26. DuCharme Aff., Ex. F at 5. Plaintiffs now claim this payment as a cost of litigation and seek recovery. However, this cost was incurred by plaintiffs' counsel as a result of their failure to file their motion on time. This cost was not an ordinary litigation expense and, because it resulted from counsel's error, could not ordinarily be charged to a client. Accordingly, the costs claimed by plaintiffs will be reduced by $4,196.26.

g. Lodging

Plaintiffs claim a total of $972.96 for lodging and meals for their counsel in traveling to New York City to defend the depositions of plaintiffs' expert witnesses. DuCharme Aff., Ex. F at 4. Defendants contend that this item lacks sufficient documentation. Defs. Mem. of Law at 11. As defendants note, plaintiffs' claim simply states the total amounts for lodging ($740.96) and meals ($232.00) for the period from May 24-29, 1999. The time records of plaintiffs' counsel indicate that these expenses were incurred by one attorney. *Id.*, Ex. D at 22-23. Thus, plaintiffs' counsel paid $185.24 per night for lodging for four nights in New York City and spent an average of $46.40 per day for five days for meals. Neither amount is unreasonable, their documentation is sufficient here, and plaintiffs will be allowed these costs.

h. Adjustment of Costs

As noted above, plaintiffs' claims for attorneys' fees was adjusted downward by plaintiffs to exclude that portion of the fees incurred on behalf of the ten plaintiffs who previously settled their claims or who did not prevail at trial. DuCharme Aff. at ¶ ¶ 6-8. It does not appear from plaintiffs' motion that any similar exclusion was performed for the costs claimed and that the costs claimed constitute all costs incurred in the litigation. Defendants contend that the costs claimed should be reduced by the portion of those costs attributable to the ten plaintiffs. Defs. Mem. of Law at 7 n. 2. Any costs incurred on behalf of the two nonprevailing plaintiffs are not recoverable here. It is unclear whether the costs incurred on behalf of the eight settling plaintiffs were included in any of their settlement agreements. In the absence of proof that the parties agreed in those settlement agreements that plaintiffs could seek an award for costs incurred on behalf of those eight plaintiffs as part of this motion, plaintiffs have failed to satisfy their burden of demonstrating entitlement to costs on behalf of those plaintiffs.

Accordingly, after the costs claimed by plaintiffs have been reduced in the amounts indicated above, that adjusted claim for costs must be further reduced in accordance with the methodology utilized by plaintiffs to exclude the attorneys' fees incurred on behalf of the ten plaintiffs. Plaintiffs' claim for costs of $58,469.37 must be reduced as indicated above by a total of $21,942.67, yielding an adjusted claim for costs of $36,526.70. The methodology utilized by plaintiffs and accepted by defendants for deducting the portion attributable to the ten plaintiffs requires that this adjusted claim for costs be reduced by 35.71%, or $13,043.68. DuCharme Aff. at ¶ 8. Therefore, plaintiffs are awarded costs in a total amount of $23,483.02.

V. Conclusion

For the reasons stated above, it is hereby

ORDERED that:

1. Defendants' motion (Docket No. 137) for:

A. Judgment as a matter of law is **DENIED**; and

B. A new trial or remittitur is **DENIED** in all respects except as to the following:

i. Defendants' motion for a new trial on the issue of damages for emotional distress awarded to plaintiffs Raymond E. Adams, Clifford J. Levendusky, Neil R. Pareene, William C. Reynheer, Allen G. Sweet and Carl T. Woodman is **GRANTED** *unless* such plaintiffs file and serve written acceptances of remittitur of the emotional distress components of their damages awards to $125,000 each on or before **March 8, 2002**; and

ii. Defendants' motion for a new trial on the issue of damages for emotional distress awarded to plaintiffs Bruce E. Palmatier and David W. Townsend is **GRANTED** *unless* such plaintiffs file and serve written acceptances of remittitur of the emotional distress components of their damages awards to $175,000 each on or before **March 8, 2002**;

2. Plaintiffs' motion (Docket No. 138) for:

A. Prejudgment interest is **GRANTED** as to plaintiffs' back pay awards and is **DENIED** in all other respects;

B. Postjudgment interest is **GRANTED**; and

C. An upward adjustment of damages for increased taxes is **DENIED**; and

3. Plaintiffs' motion (Docket No. 197) for an award of attorneys' fees and costs incurred through November 22, 2000 is **GRANTED**, and plaintiffs are awarded attorneys' fees in the amount of $873,868.09 and costs in the amount of $23,483.02.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:	January 8, 2007
Docket Number:	02-7378-cv
Short Title:	Meacham v. Knolls Atomic Power
DC Docket Number:	97-cv-12
DC:	NDNY (ALBANY)
DC Judge:	Honorable David Homer

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of January two thousand six.

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, and ALLEN G. SWEET, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

JAMES R. QUINN, Phd., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, PAUL M. GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, WILLIAM C. REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND and CARL T. WOODMAN, HILDRETH E. SIMMONS, JR., HENRY BIELAWSKI, RONLAD G. BUTLER, SR., JAMES S. CHAMBERS, ARTHUR J. KASZUBSKI, DAVID J. KOPMEYER, CHRISTINE A.

PALMER, FRANK A. PAXTON, JANICE M. POLSINELLE, TEOFILS F. TURLAIS and BRUCE E. VEDDER

Consolidated-Plaintiffs-Appellees,

v.

KNOLLS ATOMIC POWER LABORATORY, a/k/a KAPL, Inc., LOCKHEED MARTIN CORPORATION and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants-Cross-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Clifford B. Meacham, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.** It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken theron.

For the Court,
Thomas Asreen, Acting Clerk

By: /S/_____

Motion Staff Attorney

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, provides in relevant part:

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual

specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

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No. 06-1505

FILED
JUN 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, MARGARET REYNHEER, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Petitioners,

v.

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents object to the questions presented to this Court for consideration by petitioners. With respect to the first question, and contrary to certain misstatements in the petition, there is no growing split or present conflict among the circuit courts on the proper burdens of proof, persuasion and production in a disparate impact age discrimination case under the Age Discrimination in Employment Act ("ADEA").

The second question presented also misstates the record facts in this case. The alleged "practice of conferring broad discretionary authority upon individual managers to decide which employees to layoff during a reduction in force" is not the specific employment practice identified by petitioners at trial. This question also misstates the facts by ignoring the overwhelming and unrefuted evidence at trial showing that the factors used by respondents in the layoff (*i.e.*, company service, job performance, criticality and flexibility) were reasonable.

Respondents thus submit that only the following questions are presented by the petition:

1. Whether a petition for certiorari should be granted where: (i) there is no current conflict among the circuits on the proper burdens of proof and production in a disparate impact case under the ADEA, and (ii) the issue presented has recently been resolved by the Court.

2. Whether any compelling reasons exist to review the Second Circuit's determination that respondents met their burden of production and petitioners failed to meet their burden of proof at trial.

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STATEMENT PURSUANT TO RULE 29.6

KAPL, Inc.'s parent corporation is Lockheed Martin Corporation, which owns 100% of KAPL, Inc.'s stock. The publicly traded company who owns approximately 10% or more of Lockheed Martin Corporation's stock, as reported on Schedule 13G pursuant to Section 16(a) of the Securities Exchange Act of 1934, is:

State Street Bank and Trust Company, acting in various fiduciary capacities	18.7%

PRELIMINARY STATEMENT

Respondents KAPL, Inc. ("KAPL"), Lockheed Martin Corporation ("Lockheed"), and John J. Freeh ("Freeh"), former General Manager of the Knolls Atomic Power Laboratory (the "Laboratory"), oppose the petition for a writ of certiorari filed by the petitioners on May 9, 2007. For the reasons set forth in this brief, the petition, which seeks to overturn the August 14, 2006 decision of the Second Circuit Court of Appeals in favor of the respondents ("*Meacham II*"), reported at 461 F.3d 134,[1] should not be granted and should be denied in its entirety.

The petition is rife with misstatements of both law and fact related to the questions presented by petitioners. Nowhere are these misstatements more evident than in petitioners' repeated and inaccurate assertions to the effect that there is a split, conflict and a "growing division among the courts of appeals over who bears the burden of persuasion on the 'reasonable factors other than age' ["RFOA"] defense" provided in Section 623(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). Petition, 10.[2] Since this Court decided *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) ("*City of Jackson*"), there has been no conflict whatsoever, and there is no such "growing division" among the circuits, on the first question presented in the petition. That question, reduced to its essence, is whether the RFOA defense in the ADEA is an affirmative defense as to which employers like respondents bear the

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1 A copy of the Second Circuit's reported decision on remand is in the Appendix to the petition. References to the Decision are designated "*Meacham II*, [page number in the petition's Appendix]."

2 References to the petition filed in this case are designated "Petition, [page number]."

burden of proof, or whether it is instead a burden of production.

Notwithstanding petitioners' arguments to the contrary, *City of Jackson* resolved the issue raised in the first question presented when it held that "*Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240. Since *City of Jackson* was decided by this Court only two years ago, a number of court decisions in other circuits have addressed this question, and have ***unanimously*** decided that the defendant has the burden of production in raising any factors considered other than age. The plaintiff, however, still has the burden of persuading the fact finder that those factors were unreasonable. *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980, 987 (E.D. Mo. 2006) (emphasis added) (citing *Meacham II*, 461 F.3d at 142); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) ("*Pippin*"); *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603, 607 (9th Cir. 2005); *Mattensen v. Baxter Healthcare Corp.*, 438 F.3d 763, 767 (7th Cir. 2006).

In stark and unmistakable contrast to the position taken now by the petitioners in their first question presented, petitioners conceded below that respondents' burden at trial was merely one of production and that they (the petitioners) bore the burden of proof at trial on any alleged "unreasonableness" in respondents' facially neutral involuntary reduction in force ("RIF") policies. Petitioners should be precluded from claiming otherwise here, having previously agreed with and advocated for the very same burden-shifting approach adopted and applied by the Second Circuit in *Meacham II*.

There is likewise no conflict between the Second Circuit's decision in *Meacham II* and any valid or existing RFOA regulations issued by the Equal Employment

Opportunity Commission ("EEOC"). Indeed, the EEOC's RFOA regulations, which expressly deal only with disparate treatment cases, were effectively rejected by a majority of the Court in *City of Jackson*. The EEOC's regulations are also in the process of being reviewed and revised to conform to *City of Jackson*. The EEOC's regulations are thus entitled to no deference under *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984), or otherwise.

Additionally, contrary to the arguments made by petitioners, there is also no conflict or inconsistency between the decision in *Meacham II* and the prior, controlling decisions of this Court, including *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) ("*Watson*"), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) ("*Wards Cove*"), and *City of Jackson*. Indeed, after this Court vacated the Second Circuit's prior decision in this case, reported at 381 F.3d 56 (2d Cir. 2004) ("*Meacham I*"),[3] and remanded for reconsideration in light of *City of Jackson* (*see KAPL, Inc. v. Meacham*, 544 U.S. 957 (2005)), the Second Circuit did precisely what it was directed to do by the Court and reconsidered *Meacham I*, following both *City of Jackson's* and *Wards Cove's* teachings to the letter. In so doing, the Second Circuit properly adopted and applied *Wards Cove's* familiar burden-shifting analysis to the petitioners' disparate impact age discrimination claims under the ADEA, as modified by a majority of the Court in *City of Jackson*, to preclude any requirement that the respondents prove or establish "business necessity" and to foreclose petitioners'

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[3] The initial decision rendered by the Second Circuit in this case prior to the remand by this Court is contained in the Appendix to the petition. References to this decision are designated "*Meacham I*, [page number in the petition's Appendix]."

reliance on alleged "equally effective alternatives." *See City of Jackson*, 544 U.S. at 243.

Furthermore, as discussed in greater detail below, petitioners' new claim, expressed for the first time in this manner in the second question presented in the petition, to the effect that respondents had a "practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during" the RIF (Petition, i), misstates the facts and the record evidence introduced at trial and relied upon by the Second Circuit in *Meacham II*. This alleged practice was not the specific employment practice identified by the petitioners at trial as causing a disparate impact due to age. *See Meacham* Decision and Order, 84a.[4] Instead, petitioners contended at trial that the facially neutral policy was the overall selection process called for by respondents' RIF guidelines. *Id.* Over respondents' objections, the Second Circuit on remand gave petitioners the benefit of the doubt on this issue by finding that the specific employment practice identified by petitioners was respondents' alleged "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility.'" *Meacham II*, 15a.

Even if petitioners had identified and proved at trial that respondents' alleged "practice of conferring broad discretionary authority upon individual managers" caused the statistical disparities complained of, which they failed to do, the Second Circuit properly held in

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[4] The District Court's decision, rendered February 13, 2002, is reported at 185 F. Supp. 2d 193 (N.D.N.Y. 2002) and is contained in the Appendix to the petition at pages 70a-154a. References to this Decision are designated "*Meacham* Decision and Order, [page number in the petition's Appendix]."

Meacham II that respondents' burden at trial "was to advance a justification for these features of the IRIF, and it was [petitioners'] burden to demonstrate that that justification [was] unreasonable." *Id.* The Second Circuit also correctly held, both in *Meacham I* and *Meacham II*, that the District Court was correct in holding that KAPL satisfied its burden of producing evidence that a legitimate business justification motivated the challenged components of the RIF. *Meacham I*, 59a; *Meacham II*, 15a; *Meacham* Decision and Order, 93a-94a.

Whether characterized as a burden of production or one of proof and persuasion, the record evidence in this case demonstrates that respondents met their burden at trial of showing that the criteria used to select employees for layoff in the RIF, including flexibility and criticality of skills, were reasonable. In fact, as the Second Circuit acknowledged in *Meacham I* and *Meacham II*, respondents introduced substantial evidence that their legitimate business justification – reducing the "workforce while still retaining employees with skills critical to the performance of KAPL's functions" – motivated the challenged components of the RIF and that, unchallenged, KAPL's justification would preclude a finding of disparate impact. *Meacham I*, 59a; *Meacham II*, 8a.

At trial, the petitioners failed to challenge this substantial probative evidence of reasonableness, including the testimony of respondents' expert, Dr. Frank Landy, and other KAPL witnesses, discussed below. Indeed, petitioners failed to rebut the respondents' proof in this regard with any probative evidence of their own on this issue. This failure was appropriately noted by the Second Circuit, which observed that petitioners, "who bear the burden of demonstrating that KAPL's action was unreasonable, did not directly challenge the testimony of

KAPL principals regarding the planning and execution of the IRIF." *Meacham II*, 18a.

Even now, petitioners candidly admit that they are not complaining "that [respondents] attempted to lay off inflexible workers with less critical skills; [rather,] their complaint is that the means chosen [by respondents] to fulfill that goal were so haphazard and unconstrained that age could be used by supervisors as an illegitimate proxy for flexibility and criticality, thereby exposing older workers to the central harm the ADEA was enacted to prevent." Petition, 27. This claim, never proven and completely at odds with the undisputed proof of "reasonableness" relied upon by the Second Circuit in *Meacham II*, is tantamount to and indistinguishable from petitioners' intentional age discrimination claims. All of those claims were rejected by the jury at trial in this case, which found that all twenty-eight (28) original plaintiffs, petitioners included, failed to prove that the respondents were motivated by the plaintiffs' ages when they were selected for layoff in the RIF based on their managers' assessments of their individual performance, company service, flexibility, and criticality to the work of the Laboratory.

Having failed to prevail at trial on their intentional discrimination claims, petitioners may not now seek to negate the jury's verdict on this issue by alleging, as part of their disparate impact claims, that their layoffs were the result of "subconscious age bias," or "stereotypes of older workers as inflexible and outdated." While these allegations might state a claim for disparate treatment – a claim squarely rejected by the jury and subsequently dismissed by the district court in this case – they do not state a disparate impact claim under the ADEA. *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Wado v. Xerox Corp.*, 991 F. Supp. 174, 186 (W.D.N.Y. 1998), *aff'd*, 196 F.3d 358 (2d Cir. 1999);

Kourofsky v. Genencor Int'l, Inc., 459 F. Supp. 2d 206, 215 (W.D.N.Y. 2006). *See also Khalil v. Farash Corp.*, 452 F. Supp. 2d 203 (W.D.N.Y. 2006).

Finally, as discussed in greater detail below in Point II, petitioners' claim before this Court that respondents' use of "subjective criteria like 'flexibility' and 'criticality of skills'" was "without implementation of meaningful checks [which] led to 'startlingly skewed' results" (Petition, 26), ignores and misstates the record evidence at trial. Contrary to petitioners' claim, the preponderance of the evidence demonstrated, as the Court of Appeals noted after remand, that "KAPL set standards for managers constructing [the layoff] matrices and selecting employees for layoff, and it did monitor the implementation of the RIF." *Meacham II*, 19a. Although ignored by petitioners, the evidence further established, as the Second Circuit also observed, that respondents' RIF policies "restricted arbitrary decision-making by individual mangers, and the measures that KAPL put in place to prevent such arbitrary decision-making and ensure the layoffs satisfied KAPL's business needs – while not fool proof – were substantial." *Id.*

After *City of Jackson*, it is not enough for petitioners to allege, as they have in their petition and as they did before the Second Circuit and at trial, that there were other alternatives and that respondents could have done even more. This line of argument is foreclosed by *City of Jackson*. To hold otherwise, as discussed below, would not only be inconsistent with *City of Jackson* and the RFOA exception to liability under the ADEA, but would also put undue pressure upon employers to use impermissible and unlawful quotas to avoid a disparate impact ADEA claim.

COUNTER STATEMENT OF THE CASE

At the trial in this case (although nowhere is this mentioned in the petition), petitioners asserted two separate theories of age discrimination. *Meacham I*, 43a-45a. Petitioners first alleged that respondents intentionally discriminated against them because of their ages in selecting them for termination from employment during a RIF implemented in 1996. Second, they alleged that the same actions that formed the basis of their intentional age discrimination claims also resulted in a disparate impact on employees age forty and over. *Id.*

As noted earlier, petitioners have similarly failed to mention anywhere in their petition that the jury *completely exonerated* respondents from all liability on petitioners' claims of intentional age discrimination under both federal and state law. More specifically, the jury found, on both a "direct evidence" theory and a "pretext" theory, as to each of the original twenty-eight (28) plaintiffs, that they failed to prove that the respondents were motivated by age in selecting them for termination in the RIF. Nevertheless, the jury found in favor of a sub-group of twenty-six of the original twenty-eight plaintiffs on their disparate impact claims. *Id.* at 45a.

Factual Background

As correctly explained in both *Meacham I* and *Meacham II*, KAPL, a wholly owned subsidiary of Lockheed Martin, manages and operates the Laboratory, which is a government-owned nuclear research and development facility, pursuant to a contract with the United States Department of Energy ("DOE"). *Meacham I*, 37a-38a; *Meacham II*, 4a. As also noted correctly by the Second Circuit, employees at KAPL work on "designing advanced nuclear powered propulsion systems;

training sailors to operate them; and overseeing their maintenance, repair, refueling and decommissioning." *Meacham I*, 37a.

In 1996, the United States Naval Nuclear Propulsion Program (referred to in *Meacham II* as "NR"), which funds KAPL's operations (together with the DOE) and sets annual staffing limits for the Laboratory, imposed a more stringent limit on annual staffing levels. At the same time, NR assigned certain additional work to the Laboratory that required new hires. *Meacham I*, 38a. This case arises out of a RIF of Laboratory personnel implemented in 1996 in response to NR's revised annual staffing limits, which was in turn a response to the end of the Cold War. *Meacham II*, 5a.

KAPL attempted to meet this staffing ceiling without laying off employees involuntarily, but could not avoid a RIF. *Meacham I*, 38a. To determine which salaried employees should be laid off, KAPL designed an age-neutral matrix for ranking employees based upon comparative performance, criticality of skills, flexibility (ability to perform more than one job), and years of company service. *Id.* at 39a-40a.

Contrary to petitioners' statement that KAPL conferred unfettered or broad discretion on its managers during the RIF selection process, respondents produced substantial and unrefuted evidence at trial demonstrating that KAPL provided specific definitions explaining each of these selection criteria as well as training on how to apply them. Moreover, respondents produced uncontroverted evidence at trial showing that these RIF selection criteria (*i.e.*, performance, company service, criticality and flexibility) are job-related and reasonable. In fact, respondents produced evidence showing that these layoff selection criteria, and the safeguards adopted to ensure that the RIF was

implemented fairly, were among the best practices used by employers in similar layoff situations. *Meacham II*, 5a-6a; 16a.

The testimony at trial included that of Dr. Frank Landy, an expert in industrial psychology with substantial experience in downsizings. The petition omits the fact that Landy testified, based on his detailed review of the RIF procedures and their implementation, that KAPL's practices met the "job-related" standard recognized by experts in the field. Landy's testimony also established that the RIF decisions were based upon essential jobs or skills necessary to do the work at KAPL and that the process used by KAPL to select employees for layoff was clearly job-related and consistent with KAPL's business needs. *Id.* at 16a.

Landy further explained how each of the four criteria on the matrix was commonly used in selecting employees for downsizing. According to Landy, criticality is commonly used to assess the skill level of individuals to perform necessary work and flexibility is necessary because the greater number of skills the employee has, the more valuable they are to the employer in performing potential work. Landy also testified that assessments of past performance are valuable as a predictor of future performance, while company service is valuable to retain institutional memory. *Id.*

Landy's testimony was consistent with the testimony offered by other KAPL witnesses, including but not limited to Dennis Burek, KAPL's Staffing Manager. Burek testified that an employee's flexibility measures the scope of that employee's skills to determine whether he or she had skills which could enable them to be used in other parts of the Laboratory or to be retrained for other Laboratory work. Flexibility was important because KAPL needed to retain employees who could perform

more than one function, especially with a workforce that was declining in overall numbers. Criticality was used to assess how important a person's skills were for the Laboratory and Naval Reactors program under which KAPL works. This was essential, according to Burek, because KAPL needed to determine whether the loss of skills would render it unable to perform its work or would reduce the quality of the work performed, and whether it could afford to lose certain skills.

The testimony at trial also included that of KAPL managers who completed and/or reviewed the layoff matrices, as well as that of senior managers and KAPL's legal counsel. The undisputed testimony of these KAPL witnesses established that respondents did in fact review and audit the reasons supporting each termination decision and concluded that each of the low rankings was the result of legitimate, non-discriminatory business reasons related to the employees' company service, job performance, flexibility, and criticality to the work of the Laboratory. *Meacham II*, 17a. Accordingly, KAPL proceeded, in good faith, with the RIF. *Meacham I*, 73a-74a.

At trial, as well as on appeal to the Second Circuit, petitioners did not dispute respondents' showing that the selection criteria themselves were reasonable ones. Rather, petitioners sought to prove only that the RIF selections were infected by age bias (a disparate treatment argument completely rejected by the jury), and that there were alternatives to the RIF. *Meacham II*, 18a. In *Meacham I*, the Second Circuit rejected the alternatives petitioners had relied upon at trial, finding that they were replacements for the RIF itself, which "was (and is) a personnel decision justified by KAPL's business objectives." *Meacham I*, 80a. Petitioners' have never challenged this finding.

The Second Circuit in *Meacham I* nevertheless upheld the verdict, finding that there was at least one suitable alternative to the RIF; namely, using more safeguards against subjectivity. On remand, the Second Circuit concluded that their analysis was untenable, however, in light of *City of Jackson's* ultimate holding that the RFOA's reasonableness inquiry precludes a consideration of alternatives. *Meacham II*, 9a.

Petitioners did not dispute any of these findings below before the Second Circuit and cannot do so now before this Court. Similarly, the EEOC expressly conceded in the proceedings below after remand, in their brief as amicus curiae for the petitioners, that the respondents "explained that the purpose of the IRIF and its constituent parts was to reduce the workforce while still retaining employees with skills critical to the performance of KAPL's functions" and that **"this purpose is important and facially legitimate."** EEOC Brief on Remand, pp. 18-19 (emphasis added).

ARGUMENT

POINT I

THERE IS NO "GROWING DIVISION" OR PRESENT CONFLICT AMONG THE CIRCUITS ON THE QUESTIONS PRESENTED IN THE PETITION

Contrary to repeated misstatements of law and fact contained in the petition, there is no "growing division" or present conflict between the decision in *Meacham II* and the decisions of other circuit courts which have addressed the questions here presented. Indeed, the Court in *City of Jackson* resolved the first issue presented here regarding the appropriate burdens of proof and production when it held that: "*Wards Cove's*

pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240.

Title VII and the ADEA contain nearly identical language prohibiting employment decisions having a disparate impact. *Id.* at 233 (observing that "except for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,'" Section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a), is identical to Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)). However, as the Court explained in *City of Jackson*, the two statutes differ in one important respect: the ADEA contains a provision (*i.e.*, the RFOA exemption) which permits employers to take actions otherwise prohibited under the statute if such actions are based upon reasonable factors other than age.

As explained by Justice Stevens, writing for the Court in *City of Jackson*, "in cases involving disparate-impact claims . . . the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a non-age factor that was 'reasonable.'" *Id.* at 239. In other words, disparate impact claims under the ADEA "are strictly circumscribed by the RFOA exception." *Id.* at 439 (O'Connor, concurring).

Importantly, *City of Jackson* did not change the respective burdens of proof and production in a disparate impact case based on age, but held that the same burdens of proof and production applicable to similar cases under Title VII (under *Wards Cove*) apply equally to disparate impact cases under the ADEA. Indeed, the Court held that, under the ADEA, just like under Title VII, the plaintiff must first identify a specific employment practice which is responsible for the disparate impact in order to state and establish a prima facie case of disparate impact age discrimination. *Id.* at 241 ("It is not enough to simply allege that there is a disparate impact

on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."). Secondly, the Court held that even if the plaintiff demonstrates that there is such a specific employment practice that resulted in a disparate impact, the employer may defend its actions by showing that the challenged practice "was based on reasonable factors other than age." *Id.*

In so ruling, the Court recognized that "age unlike race or other classifications protected by Title VII, may be correlated with an individual's capacity to engage in certain types of employment." *Id.* at 240. Accordingly, and because of the RFOA provision's liability-limiting effects, the Court held that in a disparate impact age discrimination case under the ADEA an employer is not required to prove "business necessity" to defend itself, but need only show that its actions were reasonable and based on reasonable non-age factors.

The Court concluded that this narrower "reasonableness inquiry" is different than the "business necessity" test articulated in *Wards Cove* for Title VII cases, "which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class." As explained by Justice Stevens, "the reasonableness inquiry includes no such requirement." *Id.* at 243 (observing that "[w]hile there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable").

A. The Circuit Courts Are Unanimous in Applying the Correct Evidentiary Burdens Following *City of Jackson*

Since *City of Jackson* was decided only two years ago, the courts of appeals and district courts have had no difficulty following its holdings. In fact, as regards the first question presented in the petition, it was recently observed by one district court that:

> a number of court decisions in other circuits have addressed this question, and have **unanimously** decided that after the plaintiff has presented evidence of a prima facie case of disparate impact age discrimination, the defendant has the burden of production, in raising any factors considered other than age. The plaintiff then has the burden of persuading the fact finder that those factors were unreasonable.

EEOC v. Allstate Ins. Co., 458 F. Supp. 2d 980, 993 (E.D. Mo. 2006) ("*Allstate*") (emphasis added).

The district court in *Allstate* cited and relied upon *Meacham II*, particularly for the Second Circuit's holding that "[t]he best reading of the text of the ADEA – in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable." *Allstate*, 458 F. Supp.2d at 993. *Allstate* also relied upon the following recent decisions from the Seventh, Ninth, and Tenth Circuits: *Pippen v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) ("Thus, after an employee establishes a prima facie case of disparate impact age discrimination under the ADEA, the burden of production shifts to the employer to assert that its neutral policy is based on a reasonable factor other than

age. . . . [A]n employee must ultimately persuade the factfinder that the employer's asserted basis for the neutral policy is unreasonable."); *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603, 607 (9th Cir. 2005) ("Qualcomm [defendant] produced unrebutted evidence that its termination decisions were made to satisfy the differing business needs of the varying divisions and departments . . . ."); and *Mattensen v. Baxter Healthcare Corp.*, 438 F.3d 763, 767 (7th Cir. 2006) (finding that it was erroneous to instruct the jury that the RFOA requirement was an affirmative defense). *See also Seasonwein v. First Montauk Sec. Corp.*, 189 Fed. Appx. 106 (3d Cir. 2006) (affirming the grant of summary judgment to employer where plaintiff failed to establish a prima facie case of disparate impact age discrimination).

These cases (and the lack of others to the contrary), decided after this Court's decision in *City of Jackson*, conclusively show that there is no conflict whatsoever on the first question presented, as petitioners have asserted. The courts of appeals have indeed been unanimous in holding that the RFOA defense is not an affirmative defense. These decisions are fully in accord with *City of Jackson*'s holdings with respect to the appropriate burdens of proof and production to be used in disparate impact cases under the ADEA.

The Second Circuit's decision in *Meacham II* is entirely consistent with all of the other post-*City of Jackson* circuit court decisions, and with other lower court decisions decided in and outside of the Second Circuit. *See, e.g., Adams v. Lucent Techs., Inc.*, No. 2:03CV300, 2007 U.S. Dist. LEXIS 662 (S.D. Ohio Jan. 3, 2007); *Gaskey v. Fulton Bellow, LLC*, No. 3:05-CV-540, 2007 U.S. Dist. LEXIS 19841 (E.D. Tenn. Mar. 20, 2007); *Kourofsky v. Genencor Int'l, Inc.*, 459 F. Supp. 2d 206 (W.D.N.Y. 2006) (following *Smith*, *Wards Cove*, and

Meacham II in dismissing plaintiff's disparate impact claims under the ADEA).

Tellingly, petitioners have not cited a single circuit court or district court decision decided since *City of Jackson* departing or differing in any respect from the burden-shifting approach adopted and applied in *Meacham II*, *Pippen*, *Durante*, *Mattenson*, *Seasonwein*, *Allstate*, *Kourofsky*, and other similar cases. That is because no such case exists.

In a disingenuous effort to manufacture a conflict between the circuits where none currently exists, petitioners hearken back more than twenty (20) years to the Ninth Circuit's decision in *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983), and more than thirty (30) years to the Sixth Circuit's decision in *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975). The rationale expressed in these older decisions cannot and does not survive *City of Jackson*.

In fact, *Criswell* was effectively overruled on this point by *City of Jackson* and by *Durante*, a post-*City of Jackson* decision from the Ninth Circuit nearly on all fours with the decision in *Meacham II*. And the dicta relied upon by petitioners from the Sixth Circuit's decision in *Laugesen*, which was a disparate treatment case, simply does not stand for the proposition cited in the petition. *See* Petition, 12. In any event, a subsequent and more recent Sixth Circuit case decided after *Laugesen*, but not cited by petitioners, supports the view that an employer's burden in a disparate impact case under the ADEA is one of production only and not one of proof. *Abbott v. Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990).

In short, neither *Criswell* nor *Laugesen* supports the petitioners' claims that a conflict among the circuits

exists, and petitioner's reliance on these two outdated cases does not create a current conflict ripe for Supreme Court review.

B. Petitioners Conceded Below that the Employer's Burden Is One of Production

Also significantly undercutting petitioners' argument is the fact that petitioners themselves admitted below that the ADEA's RFOA exception is not an affirmative defense, but is instead a burden of production. In fact, after this Court remanded this case, the Second Circuit invited the parties to submit briefs regarding the impact of *City of Jackson* on the decision in *Meacham I*. In response, petitioners conceded, in their Brief, that *City of Jackson* "provides some guidance regarding the burden shifting analysis which the lower courts are to employ when litigating disparate impact claims brought under the ADEA." Brief for Plaintiffs-Appellees-Cross-Appellants On Remand from the United States Supreme Court, June 13, 2005 ("Petitioners' Brief on Remand"), 1-2.

Petitioners also admitted in their Brief on Remand that in *City of Jackson*, "the Supreme Court held that . . . the burden shifting analysis previously set forth in *Wards Cove*, continues to be applicable to disparate impact claims brought under the ADEA." *Id.* at 6. Petitioners candidly admitted below that: "the defendant-employer does **not** have the burden of proof to establish business necessity under the ADEA as it does in a Title VII disparate impact case." *Id.* (emphasis in original).

Similarly, when addressing the respondents' "Business Justification" for the RIF, petitioners took a position diametrically opposed to the one they are now taking in their petition on the first question presented,

conceding that "when analyzing a disparate impact claim of age discrimination, the 1991 amendments to Title VII do **not** apply" and "that the burden shifting analysis previously set forth in *Wards Cove*, is applicable to disparate impact claims brought under the ADEA." Petitioners' Brief on Remand, 13. According to Petitioners:

> This requires that once [petitioners] met their burden under step one, [respondents] were required to produce evidence of their business justification for their use of the practices identified by the employee. *Wards Cove*, 490 U.S. at 658. **A defendant-employer's burden remains one of production, not proof.** *Wards Cove*, 490 U.S. at 659-660, *Watson*, 487 U.S. at 997. **The "ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."** *Wards Cove*, 490 U.S. at 659, quoting, *Watson*, 487 U.S. at 997.

Id. at 13-14 (emphasis added).

In *Meacham II*, the Second Circuit subsequently agreed with, adopted and applied this same burden-shifting approach to the petitioners' disparate impact age discrimination claims under both the ADEA and the New York State Human Rights Law, N.Y. Exec. Law § 296. Having conceded and argued below that the burden of proving disparate impact age discrimination was in fact at all times theirs, and that respondents' RFOA burden at trial was nothing more than a burden of production, petitioners should not now be allowed to reverse course and make exactly the opposite argument in an effort to

obtain review of the Second Circuit's well-reasoned decision in *Meacham II*.

C. The EEOC'S RFOA Regulations Are Not Entitled To Deference

As already noted, in *City of Jackson* this Court concluded that the "reasonableness inquiry" under the ADEA's RFOA provision is different than the "business necessity" test articulated in *Wards Cove* for Title VII cases. Again, "the reasonableness inquiry includes no such requirement." *City of Jackson*, 544 U.S. at 243. In reaching this decision, the majority of the Court effectively rejected the EEOC's regulations on this subject. *Id.* at 266-67. *City of Jackson* also necessarily rejected, in a disparate impact case, the next provision of the regulation which states, in relevant part, that "[w]hen the exception of a [RFOA] is raised against an individual claim of ***discriminatory treatment***, the employer bears the burden of showing that the [RFOA] exists factually." 29 C.F.R. 1625.7(e) (emphasis added).

Here, petitioners assert that the Second Circuit's decision in *Meacham II* is at odds with this regulation, and that this regulation is entitled to what has come to be known as "*Chevron* deference" under *Chevron U.S.A. Inc., v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioners' argument misses the mark, however, and completely ignores *City of Jackson*'s narrower reading. Indeed, as correctly pointed out by the panel majority in *Meacham II*, this regulation on its face applies only "in the context of disparate treatment" and was effectively rejected by *City of Jackson*. *Meacham II*, 13a n.6. As a result, the majority of the three-judge panel in *Meacham II* properly refused to give the EEOC's regulation, or their position in the proceedings below after remand, "any weight." *Id.*

No different conclusion should be reached by the Court in this case. This is especially so given the fact that the EEOC has reported publicly that it intends to revise its regulations on the RFOA provision of the ADEA to conform to the decision in *City of Jackson*. *See, e.g.*, *EEOC Semiannual Regulatory Agenda*, 70 Fed. Reg. 65,359 (Oct. 31, 2005).

Finally, the legislative history of the ADEA, and its subsequent amendment in 1990 by the Older Workers Benefit Protection Act ("OWBPA"), codified in part at 29 U.S.C. § 623(f)(2), offers no support at all to the position taken by the petitioners before this Court (*see* Petition, 18-19), and by Judge Pooler in her dissent in *Meacham II*. *See Meacham II*, 27a-28a. Both Judge Pooler and the petitioners rely upon a Senate Committee report (*see*, S. Rep. No. 101-263, as reprinted in 1990 U.S.C.C.A.N. 1509, 1535), concerning an earlier draft of the proposed legislation. That earlier draft contained a provision at the end of ADEA Section 4(f) stating that: "[a]n **employer . . . acting under paragraphs (1) [*i.e.*, BFOQ] or (2) [*i.e.*, RFOA] shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act.**" This provision was ultimately eliminated completely from the final version of the bill, which then became law.

In any event, with respect to the RFOA provision, as noted by Judge Pooler in *Meacham II*, "the OWBPA's legislative history is not relevant to determining the intent of [the Congress] who enacted Section 623(f)(1), which was not changed by the OWBPA." *Meacham II*, 28a.

Under all these circumstances, this Court should afford no weight at all to the EEOC's position or pre-*City of Jackson* regulations on this question. It cannot fairly be said that *Meacham II* (or the decision of any other

circuit court) is in conflict with any EEOC regulation entitled to *Chevron* deference with respect to the first question presented by petitioners.

POINT II

THERE ARE NO COMPELLING REASONS WHY THIS COURT SHOULD REVIEW THE SECOND CIRCUIT'S FINDINGS THAT PETITIONERS FAILED TO CARRY THEIR BURDEN OF PROOF AT TRIAL

On their second question presented, petitioners urge this Court to grant their petition and basically to hold, as a matter of law, that employers may never use managerial discretion or subjective criteria in selecting employees for a RIF any time there is a statistical disparity in the rates of selection between older and younger workers. Petition, Point II. This is contrary to well-established law and there are no compelling reasons for granting such a request.

A. Petitioners' Claims Are Contrary to Settled Law

Long before *City of Jackson* was decided, the Court made it clear in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981), that an "employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."

Since that time, lower federal courts have uniformly held that an employer may exercise discretion or use subjective factors to make personnel decisions so long as the decisions are not based on an unlawful factor. *See, e.g., Pippin*, 440 F.3d at 1195 (affirming the dismissal of plaintiffs' disparate impact claim and holding

that, as a matter of law, the employer's decision to terminate employees during a RIF based upon their performance and skill set was not unreasonable); *Chapman v. AI Transp.*, 229 F.3d 1012, 1034 (11th Cir. 2000) (finding that a subjective reason is a legally sufficient, non-discriminatory reason if the defendant articulates a reasonably specific factual basis upon which it is based); *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) (holding that where an employer's explanation, offered in clear and specific terms, "is reasonably attributable to an honest even though partially subjective evaluation of ... qualifications, no inference of discrimination can be drawn"); *Armstrong v. Blair*, No. CIV-03-0255-C, 2006 U.S. Dist. LEXIS 65280 (W.D. Okla. 2006) (citing *Simms v. Oklahoma*, 165 F.3d 1321 1330 (10th Cir.), *cert. denied*, 528 U.S. 815 (1999)).

Even Judge Pooler of the Second Circuit, the lone dissenter in *Meacham II*, has previously held that "there is nothing unlawful about an employer's basing its hiring on subjective criteria" and that "[a]n employer is entitled to arrive at a subjective evaluation of a candidate's suitability for a position." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 104-06 (2d Cir. 2001). Of course, the panel majority in *Meacham II* appropriately followed *Byrnie* in this regard and is consistent with the other decisions cited above.

Moreover, both state and federal courts considering claims of disparate impact age discrimination under the ADEA and the New York Human Rights Law, including the Second Circuit, have recognized that the very same subjective criteria used by KAPL in this case, including performance, criticality of skills, and flexibility, are legitimate and reasonable criteria upon which to base a RIF, as a matter of law. *See, e.g., Pippin*, 440 F.3d at 1201 (performance, needed skills and recruiting concerns are all reasonable business considerations in selecting

employees for a RIF); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666 (7th Cir. 1998) (evaluating an individual or group based upon their lack of flexibility is not to indulge in age stereotyping; instead it is the kind of evaluation that is appropriate under the anti-discrimination laws). *Accord Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 987-988 (10th Cir. 1996), *cert. denied sub nom. Doan v. Seagate Tech.*, 519 U.S. 1056 (1997); *Hardy v. GE*, 270 A.D.2d 700, 702 (N.Y. App. Div.), *appeal denied*, 95 N.Y. 2d 765 (2000). The Second Circuit's decision in *Meacham II* is in accord with these decisions, as well as with this Court's decision in *Watson*, and should not be disturbed.

In *Watson*, this Court specifically held that subjective criteria could be challenged on disparate impact grounds under Title VII. The Court did not hold, however, and it stopped well short of ruling, that subjective criteria could never be used by employers in making their employment decisions if a statistical disparity resulted. In fact, *Watson* suggested just the opposite when it recognized that subjective traits necessarily and legitimately enter into personnel decisions and are essential to an individual's success. *Watson*, 487 U.S. at 999 (citing with approval the Second Circuit's decision in *Zahorik v. Cornell Univ.*, 729 F.2d 85, 96 (2d Cir. 1984) that "[i]t would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review").

The very same reasoning applies under the ADEA which, as already noted, is even more narrowly circumscribed than Title VII because of the RFOA limitation on employer liability.

B. The Court Should Not Constrain Reasonable and Otherwise Legal Business Decisions

Although the Court held in *Watson* that disparate impact challenges to subjective employment practices are permitted under Title VII, the *Watson* Court also cautioned that: "[i]n evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that '[c]ourts are generally less competent to restructure business practices, and unless mandated to do so by Congress they should not attempt it.'" 487 U.S. at 999 (quoting *Furnaco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

The Second Circuit's decision in *Meacham II* obviously had these same concerns in mind when, citing *Furnaco* and Judge Pooler's prior decision in *Byrnie*, the panel majority explained that it was important for the court to "keep in mind that 'we are not a super-personnel department.'" *Meacham II*, 16a. *See also Wittenburg v. Am. Express Fin. Advisors, Inc.*, 464 F.3d 831 (8th Cir. 2006) (recognizing that courts do not sit as super-personnel departments to review the wisdom or fairness of a company's job elimination policies during a RIF).

The Supreme Court in this case must likewise keep these same concerns in mind before granting petitioners' extraordinary request to outlaw the use of subjective criteria if there is evidence of a statistical disparity, as there admittedly was in this case. To do otherwise would not only be at odds with prior precedents and established law, but would also unnecessarily constrain demonstrably reasonable and otherwise lawful business judgments, and put undue pressure on employers to use quotas or to give preferential treatment to workers age 40 and over.

As already noted, petitioners' second question presented is based on their unproven claim that managerial discretion in ranking employees for the RIF based on subjective assessments of criticality and flexibility led to "startlingly skewed" statistical results, which they contend, can only be the result of a hidden age bias. Petition, 26. This Court has long recognized, however, that a plaintiff in a disparate impact case must meet a "high standard of proof." *Watson*, 487 U.S. at 999. In fact, this Court has cautioned against relying on statistics alone to establish disparate impact liability even in cases involving the use of subjective selection criteria. *Id.* at 994-995.

Thus, this Court held in *Watson* that a plaintiff's burden in a Title VII case goes beyond establishing that there are statistical disparities in the workforce. *Id.* at 997. This same reasoning applies in an ADEA case because, as the Court held in *City of Jackson*, the scope of liability is narrower under the ADEA than under Title VII and the statute itself permits actions based upon reasonable non-age factors. *City of Jackson*, 544 U.S. at 240.

Petitioners contend, however, that the Second Circuit's decision in this case "effectively forecloses disparate impact challenges to subjective decisionmaking under the ADEA." Petition, 26. Stated otherwise, petitioners contend that if *Meacham II* is not overruled, employees will effectively be precluded from challenging any subjective decision making process used to select employees for a RIF because a plaintiff will not be able to prove a negative. This claim is baseless.

Under *City of Jackson*, it must again be emphasized, employers must produce evidence as to the reasonableness of their decisions. Even after *City of Jackson*, however, employees like the petitioners in this

case are still free to challenge an employer's RFOA showing. The decision by the Second Circuit here in question does nothing to alter or foreclose this opportunity.

But, in order to be successful on any such RFOA challenge in a disparate impact case under the ADEA, *Wards Cove, City of Jackson* and *Meacham II* demonstrate that an employee must do more than rely on the extent of the statistical disparities established as part of the employee's prima facie case. Rather, the employee must prove and persuade the trier of fact that the employer's actions, or the criteria the employer used in making its decision, were both unreasonable *and* based on an unlawful factor like age.

Here, the petitioners quite simply failed to meet their burden of proof and persuasion with regard to these required elements of their disparate impact claim. The respondents' proof at trial established why flexibility and criticality of skills were so important to the work and mission of the Laboratory and that these were not merely reasonable criteria upon which to rank employees for the RIF – these layoff policies and criteria are among the best practices used by employers throughout the country. As found by the Second Circuit on remand, petitioners did *not* directly challenge this proof or the testimony of KAPL witnesses in this regard. *Meacham II*, 18a.

Instead, petitioners relied at trial, as they did before the Second Circuit on remand, and as they do now in their petition, solely on the extent of the statistical disparity and "skewed" results of the RIF established by petitioners as part of their prima facie case. As the majority of the panel below correctly explained in *Meacham II*, however, it is important to distinguish between any "startlingly skewed" statistical disparities

and probative evidence that the business justifications for the outcomes were unreasonable. *Id.*

No such probative evidence on the question of "unreasonableness" was introduced or established by the petitioners at trial. And, because there can be no question here that the respondents fully satisfied their burden of showing that the layoff and the criteria they used to select petitioners for inclusion in the RIF were reasonable ones, the Court must deny petitioners' application for a writ of certiorari on petitioners' second question presented as well.

As noted in a very similar context under Title VII, this Court has reasoned that any other result would put undue pressure on employers to use quotas or provide older workers with preferential treatment to avoid disparate impact liability. *Wards Cove*, 490 U.S. at 652; *Watson*, 487 U.S. at 977. The ADEA does not require employers to give employees age forty and over preferential treatment or to make termination selections based on quotas. *See Watson*, 487 U.S. at 977.

Moreover, although petitioners fail to mention this fact, if respondents had selected different (and younger) employees for the RIF simply because they were under 40, as petitioners would have had it, it would have been a *per se* violation of New York's Human Rights Law, N.Y. Exec. Law § 296, which prohibits age discrimination against employees eighteen (18) and over.

In sum, this is a "Hobson's choice for employers...[leading] in practice to perverse results" that not even the Court in *Watson* contemplated, which Congress could never have intended when it enacted the RFOA exception as part of the ADEA, and which this Court should refuse to countenance. *Watson* 487 U.S. at 993.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied in its entirety.

Dated: June 13, 2007

Respectfully submitted,

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IN THE

Supreme Court of the United States

Clifford B. Meacham *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents do not contest that the Second Circuit's decision in this case conflicts with the Ninth Circuit's decision in *Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983), on a question this Court granted certiorari to decide in that case but did not reach. Nor do respondents dispute that the decision below conflicts with the EEOC's interpretation of its own regulations regarding the burden of proof under the "reasonable factor other than age" (RFOA) defense – an interpretation the agency reiterated through its amicus brief in this case. In addition, respondents do not even address the petition's showing that the conflict between the EEOC's view of the statute and the interpretation of a number of courts of appeals will predictably lead to an untenable disparity of treatment between the ADEA claims of similarly situated federal and private employees. *See* Pet. 15-17. And respondents make no attempt to deny that the questions presented by the petition are of recurring importance, particularly in the context of reduction in force cases – a point further emphasized by the amicus brief of the AARP and the National Employment Lawyers Association.

Respondents nonetheless oppose certiorari, asserting among other things that this Court resolved the RFOA burden of proof question in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and that the decision below is consistent with *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). *See* BIO 12-14, 22-24. Both claims are ill founded, as are respondents' other objections to granting the writ.

I. Certiorari Is Warranted To Resolve Which Party Bears The Burden Of Proof On The RFOA Defense.

1. Respondents do not dispute that the decision below conflicts with the Ninth Circuit's holding in *Criswell* that the employer bears the burden of proof on the RFOA defense. *See* Pet. 11-12. They nonetheless contend that *Criswell* was

superseded by *Smith* and overruled by subsequent circuit precedent. BIO 12, 17. Neither contention is true.

Respondents argue that *Smith* "resolved the issues raised in the first question presented when it held that '*Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.'" BIO 2. This assertion conflates two separate questions: (1) who bears the burden of proving that an employment practice has a disparate impact that would be otherwise prohibited by the "identical language" of Title VII and the ADEA; and (2) who bears the burden of proving the RFOA defense once an otherwise prohibited disparate impact has been established. *See* Pet. 22-23. As petitioners acknowledged below, *Smith* held that *Wards Cove* governs the first question because it construed the language common to both the ADEA and Title VII prohibiting employment practices with an unjustified disparate impact. *See* BIO 18-19 (quoting petitioners' appellate briefs). But once the employee sustains the *Wards Cove* burden, the employer may yet avoid liability if its practice is found to be "reasonable" under the RFOA provision. *See Smith*, 544 U.S. at 246 (Scalia, J., concurring in part and concurring in the judgment) (noting that "the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA") (emphasis in original). The question in this case is who bears the burden of proof at this later stage, after the practice has been shown to be "otherwise prohibited" under *Wards Cove*. On that question, *Smith* had nothing to say, as the Court was able to conclude that the employer's practice in that case was "unquestionably reasonable," 544 U.S. at 242, thereby avoiding the need to examine the burden of proof.[1]

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[1] Respondents are thus confused when they charge that "petitioners conceded below that respondents' burden at trial was merely one of production and that they (the petitioners) bore the burden of proof at trial on any alleged 'unreasonableness'" in the challenged employment practice. BIO 2. While petitioners

Respondents next assert that *Criswell* "was effectively overruled" by *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603, 607 (9th Cir. 2005), "a post-*City of Jackson* decision . . . nearly on all fours with the decision in *Meacham II*." BIO 17. But as respondents are presumably aware, that unpublished decision has no precedential value in the Ninth Circuit, much less the authority to overrule established circuit precedent. *See, e.g., Sorchini v. City of Covina*, 250 F.3d 706, 708 (9th Cir. 2001) (per curiam). In any event, *Durante* is entirely inapposite. The decision does not discuss the burden of proof under the RFOA defense, and does not even cite *Criswell*, much less purport to overrule it. Indeed, the burden of proof issue never came up in *Durante*, as the court concluded that the evidence overwhelmingly supported the employer's assertion that its practices were reasonable, 144 Fed. Appx. at 607, making the burden of proof immaterial.

Respondents also attempt to diminish the conflict between the decision below and the Sixth Circuit's opinion in *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975). In *Laugesen*, the court explained that the then-applicable regulation implementing the RFOA defense provided that the "burden of proof in establishing the applicability of the exception will rest upon the employer." *Id.* at 314-15 (quoting 29 C.F.R. § 860.103(e) (1975)). The court further

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acknowledged that they bore the burden of proof in establishing an "otherwise prohibited" practice under *Wards Cove*, they embraced the position of the EEOC that the employer bears the burden of proof on the separate question of whether the RFOA defense applies to excuse that otherwise prohibited practice. *See* C.A. Supp. Reply Br. 9-10. Petitioners also argued that the burden question was not critical in this case because respondents never asked for a jury instruction on the RFOA defense or objected to the instructions that were actually given. *Id.* The Second Circuit plainly disagreed on that point but never suggested that petitioners had conceded that the employee bears the burden of proof on the RFOA defense.

explained that the regulation "is aimed at policies of companies pertaining, for example, to physical fitness, educational requirements or the like, which are differentiations based on factors other than age, but which can in fact have a disparate impact upon older employees." *Id.* at 315 (citing *Griggs v. Duke Power*, 401 U.S. 424 (1971)). Respondents note that the interpretation was expressed in the context of a disparate treatment case, BIO 17, but that does not detract from the clarity or persuasiveness of the Sixth Circuit's position on this issue, which has been uncontested in that circuit ever since.[2]

2. The uncertainty regarding the burdens of proof under the RFOA provision led this Court to grant certiorari on that question in *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 408 n.10 (1985). Respondents' brief does nothing to show that the uncertainty has been resolved since that time or that this Court's intervention is no longer required. Nor do respondents contest that the question left open in *Western Airlines* is one of recurring importance in the administration of this landmark civil rights statute. *See* Pet. 13-15. Indeed, the importance of the question has been demonstrated throughout this litigation by the decisions of the EEOC and the AARP to participate as amici at various stages. *See* AARP/NELA Amicus Br. M-2 to M-3 (noting that this "issue will continue to grow in importance" as "the number of workers age 55 and older is expected to increase by 46 percent from 18.2 million to 26.6 million" by the close of this decade); EEOC C.A. Br. 2 (noting that proper interpretation

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[2] Respondents contend otherwise, citing (without explanation or even a pin cite) the decision in *Abbott v. Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990). *See* BIO 17. But *Abbott* does not even mention the RFOA defense. The case simply held that the plaintiffs failed to establish a disparate impact violation under *Wards Cove*, *see* 912 F.2d at 872-77, thereby negating any need for the employer to rely on the RFOA provision.

of the RFOA provision "raise[s] important and complex policy issues"). Prolonging the uncertainty in the operation of the RFOA defense would be contrary to the interests of employers, the federal government, and American workers.

3. This case presents an ideal opportunity for the Court to bring clarity to this important area of the law. The RFOA burden question was thoroughly briefed by the parties, along with the EEOC and other amici. *See* Pet. App. 5a. And the Second Circuit squarely resolved the question in a detailed opinion to which Judge Pooler issued a lengthy and thoughtful dissent. *See id.* 11a-15a, 25a-31a.

Respondents nonetheless insinuate that the Second Circuit had no reason to decide who bore the burden of proof on the RFOA defense because, "[a]t trial, the petitioners failed to challenge [respondents'] substantial probative evidence of reasonableness" and "failed to rebut the respondents' proof in this regard with any probative evidence of their own on this issue." BIO 5. This claim is false and was plainly rejected by court of appeals. Petitioners' principal contention below was that respondents' "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" Pet. App. 15a, was unreasonable because it unnecessarily created an avenue for the expression of unspoken age bias in the reduction in force process.[3] Far from finding that petitioners provided "no . . . probative evidence on the question of 'unreasonableness' . . . at trial," BIO 28, the Second Circuit acknowledged that "plaintiffs presented probative evidence tending to show that: (i) KAPL's criteria were subjective (and imprecise at best); (ii)

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[3] Respondents assert in passing that this "do[es] not state a disparate impact claim under the ADEA," BIO 6, but *Watson* clearly held that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." 487 U.S. at 991. To the extent there is uncertainty on this point, the Court should resolve it by granting certiorari on the second question presented by this petition.

the subjectivity disproportionately impacted older employees; (iii) KAPL observed that the disproportion was gross and obvious; and (iv) KAPL did nothing to audit or validate the results." Pet. App. 17a (internal quotation marks and citation omitted). Respondents, of course, contested these assertions, putting forward an expert who claimed that respondents had designed and implemented reasonable procedures to protect against bias in the reduction in force process. *See* BIO 10. But petitioners presented substantial evidence to rebut this assertion, including their own expert witness who testified that the procedures established for review of the decisions made by individual managers "did not offer adequate protections to keep the prejudices of managers from influencing the outcome." Pet. App. 18a (citation omitted); *see also id.* at 41a-43a.[4]

It is important to keep in mind that the Second Circuit was not conducting its own de novo review of summary judgment evidence during which it could exercise its independent judgment on the question of reasonableness. Instead, the court was reviewing a jury verdict in petitioners'

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[4] For example, the review board established to "assess[] the design and execution of the IRIF," Pet. App. 17a, received no age discrimination training and was not provided with the ages of employees recommended for layoff. *See* Trial Tr. 1292-93, 3726; *see also id.* 1510 (district court observing that there was "no evidence . . . that the review board considered age in any of its examinations or any of its reviews in this matter"). Respondents also relied on the fact that that their in-house counsel reviewed the entire process. Pet. App. 17a. However, during his review, counsel spoke to only three of the approximately thirty managers who completed matrices, Trial Tr. 1290-91, 1503; did not review the ages of the employees at issue, *id.* 1287, 1290; and, in violation of respondents' policy, failed to perform his own Adverse Age Impact Analysis, *id.* 1294-95, relying instead on the analysis prepared by the human resources department, which asked only whether the average age of the workforce had gone down as a result of laying off thirty-one workers, *see* Pet. App. 17a-18a, 40a-41a.

favor. Moreover, the jury reached its decision on the basis of jury instructions to which respondents offered no relevant objection. *See* Trial Tr. 4731-36. In fact, respondents never requested that the jury be instructed on the RFOA burden of proof question. *See id.* at 4412-95 (charge conference). Accordingly, the question before the court of appeals was simply whether, "after viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of the non-moving party, [the court] finds that there was insufficient evidence to support the verdict." Pet. App. 50a (citations omitted). In light of this deferential standard of review, it is unsurprising that the Second Circuit felt compelled to decide which party bore the burden of proof on the RFOA defense.

4. Beyond claiming that *Smith* allocated the burden of proof on the RFOA defense to the plaintiff, respondents make little attempt to defend the decision below on the merits. They do not contest that the phrasing of the defense – providing a safe haven for conduct "otherwise prohibited" by the Act, 29 U.S.C. § 623(f)(1) – is a formulation traditionally used to establish an affirmative defense upon which the defendant bears the burden of proof. *See* Pet. 17-18; *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (stating the "general rule" that the party who "claims the benefits of an exception to the prohibition of a statute" bears the burden of proof).

Nor do respondents dispute that the other defenses in 29 U.S.C. § 623 are traditional affirmative defenses. *See* Pet. 17-18. As explained in the petition, when this Court construed one such exception (for action taken in accordance with a "bona fide employee benefit plan") to place the burden of proof on the employee, *see Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 181 (1989), Congress promptly reversed that result through new legislation. Pet. 18-19. And the legislative history accompanying the bill makes clear Congress's intent to retain the pre-*Betts* case law placing the burden of proving *all* of the Section 623 defenses, including

the RFO defense, on the employer. *See id.* 19. Respondents assert that this legislative history is inapt because it describes the version of the bill reported out of committee, which was subsequently amended before passage. BIO 21. But the authors of that amendment stated expressly that the change in the language of the bill did not reflect any change in Congress's intent with respect to the burden of proof on the RFOA defense. *See* 136 Cong Rec. S13596 (statement of bill managers describing amendment) ("In particular, the managers declare that they are not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law.").

Moreover, although respondents disagree with the EEOC's position, they cannot dispute that the Commission construes the Act and its own regulations to place the burden of the RFOA defense on the employer. *See* EEOC C.A. Br. 15 ("The Commission's regulation similarly interprets RFOA to be an affirmative defense that the employer must establish.") (citing 29 C.F.R. § 1625.7); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (noting that an agency's interpretation of its own regulations must be accepted unless "plainly erroneous or inconsistent with the regulation") (internal quotation marks and citation omitted). That interpretation is consistent with the original regulations issued by the Department of Labor at the time of the statute's enactment. *See* 33 Fed. Reg. 9172, 9173 (1968) (promulgating 29 C.F.R. § 860.103).

Respondents' assertion that this Court invalidated the relevant EEOC regulation in *Smith*, *see* BIO 20, is plainly untrue. At most, the Court disagreed with the EEOC's position on the requirement of "business necessity" in 29 C.F.R. § 1625.7(d). But as Justice Scalia explained, that conclusion did not mean that the rest of that subsection (recognizing a disparate impact claim) was unworthy of *Chevron* deference. *See Smith*, 544 U.S. at 247 (Scalia, J., concurring in part and concurring in the judgment). In this case, the RFOA burden of proof question is addressed in an

entirely separate subsection of the regulation – one the Court did not cite, much less disapprove, in *Smith*. *See* 29 C.F.R. § 1625.7(e).[5]

Giving a uniform interpretation to all the defenses in Section 623(f) achieves a sensible balance, permitting employees to state a claim by proving that an employment practice is "otherwise prohibited" by the ADEA under the traditional *Wards Cove* standard, but allowing employers to escape liability if they can meet the modest burden of demonstrating that their practices are reasonable. The Second Circuit's decision in this case upsets that intended balance. This Court should grant certiorari in this case to restore it.

II. This Court Should Grant Certiorari To Decide Whether Employees May Challenge The Disparate Impact Of Employers' Subjective Decisionmaking Processes Under The ADEA.

The Court should also grant certiorari to decide whether the RFOA provision effectively precludes disparate impact challenges to an employer's practice of conferring broad discretionary authority upon individual managers to decide which employees to layoff during a reduction in force. *See* Pet. 25-29.

Evidently unable to explain why that question is unworthy of this Court's attention, respondents address a *different* question petitioners do *not* raise, accusing petitioners

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[5] Respondents also note that the EEOC has announced plans to review its ADEA regulations in light of *Smith*. BIO 20-21. But that is no ground to deny deference to the current regulation, particularly given that it is clear from the Commission's amicus brief in this case that it continues to believe that the employer bears the burden of proof under the RFOA defense after *Smith*. While the Commission will likely revise its discussion of "business necessity" in light of *Smith*, there is no reason to believe that it will reverse the position it has taken in post-*Smith* litigation on the RFOA burden of proof.

of asking this Court "basically to hold, as a matter of law, that employers may *never* use managerial discretion or subjective criteria in selecting employees for a RIF any time there is a statistical disparity in the rates of selection between older and younger workers." BIO 22 (emphasis added). To the contrary, petitioners ask only that this Court overrule the Second Circuit's holding that employers may *almost always* rely on delegated managerial discretion in termination decisions, even when the delegation predictably results in disparate treatment of older workers and is otherwise unreasonable. Pet. 25-28.

Respondents assert that under the Second Circuit's decision employees "are still free to challenge an employer's RFOA showing." BIO 27. But the decision below effectively predetermines that such challenges will always fail when an employer makes decisions on the basis of subjective recommendations by first-line supervisors. *See* Pet. App. 19a (holding that "at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable"). Respondents offer no explanation of how a system of discretionary decisionmaking by direct supervisors could ever be challenged under *Watson* in light of this holding. Review and reversal are warranted.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

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June 25, 2007

No. 06-1505

In the Supreme Court of the United States

CLIFFORD B. MEACHAM, ET AL., PETITIONERS

v.

KNOLLS ATOMIC POWER LABORATORY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Age Discrimination in Employment Act (ADEA) prohibits employment practices that have an unjustified disparate impact on older workers, *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), but also provides that it "shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). The questions presented are:

1. Whether an employee alleging disparate impact under the ADEA bears the burden of persuasion in establishing "reasonable factors other than age."

2. Whether an employer's practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constitutes a "reasonable factor other than age."

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

1. Respondent Knolls Atomic Power Laboratory (KAPL) manages and operates a federally-owned research and development laboratory under contract with the Department of Energy. In 1996, in response to a staffing limit imposed by the government, KAPL instituted an involuntary reduction in force (IRIF). Pet. App. 5a, 39a. To implement the IRIF, respondent instructed managers in units that were over-budget to rate their employees from 0 to 10 on three factors—performance, flexibility, and the criticality of their skills—

and then add up to 10 points for years of service. After ranking employees based on their scores, managers were to identify for layoff the lowest-ranked employees. *Id.* at 5a-6a, 40a. Of the 31 employees selected for layoff pursuant to this procedure, 30 were over 40 years old. *Id.* at 6a, 40a. At the time of the layoff, approximately 60% of the workforce was over 40. *Id.* at 41a, 74a-75a.

To evaluate the results of the manager's selections, KAPL charged a review board with ensuring that the selections "adher[ed] to downsizing principles as well as minimal impact on the business and employees." Pet. App. 40a. The board did not, however, consider issues of age discrimination. *Id.* at 17a, 41a. KAPL's only analysis of the adverse impact of the layoff on older workers was a comparison of the average age of the workforce, which comprised approximately 2700 employees, before and after the IRIF. *Id.* at 17a, 40a-41a. KAPL's general manager and general counsel also reviewed the layoff lists by checking the math in the scoring and consulting with some managers to see that their decisions were "properly made" and "legitimate." *Id.* at 17a-18a, 41a (citation omitted).

2. Petitioners are former KAPL employees over the age of 40 who were laid off as a result of the IRIF. In 1997, they filed suit challenging their terminations under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, and state law, alleging claims of both disparate treatment and disparate impact. In their answer, respondents pleaded as a defense that their alleged discrimination fell within ADEA's exception for employment actions based on "reasonable factors other than age" (RFOA), 29 U.S.C. 623(f)(1). Pet. App. 31a. The jury was instructed to evaluate petitioners' disparate-impact claims according to the burden-shifting anal-

ysis established by *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), under which the employee bears the ultimate burden of persuasion. See Pet. Supp. C.A. Br. 7-8 & Exh. A. Respondents did not, however, seek a jury instruction specifically concerning their RFOA defense, and no instruction was given concerning which party bore the burden of proof as to RFOA. See Pet. App. 31a. The jury found for respondents on the disparate-treatment claims, but for petitioners on the disparate-impact claims. *Id.* at 45a, 75a-76a. The district court denied respondents' motion for judgment as a matter of law. *Id.* at 77a-102a, 153a.

The court of appeals affirmed. Pet. App. 33a-69a. The court analyzed the jury's disparate-impact verdict by employing the burden-shifting framework set out in *Wards Cove*, in the context of disparate-impact claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 54a-63a; see *id.* at 7a-8a. Under that framework, a plaintiff makes a prima facie case of disparate-impact discrimination by showing that a specific employment practice or policy had a significant disparate impact on a protected group. *Wards Cove*, 490 U.S. at 656-658. The burden then shifts to the employer to produce evidence of a business justification for the challenged practice. *Id.* at 659. Once such evidence is produced, the plaintiff bears the burden of persuading the factfinder that the asserted business justification is merely a pretext for discrimination. The plaintiff may sustain that burden by showing that "other tests or selection devices, without a similarly undesirable [discriminatory] * * * effect, would also serve the employer's legitimate [business] interest." *Id.* at 660 (citation omitted).

Applying that framework to this case, the court of appeals held that petitioners adequately identified a specific employment practice—the "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" Pet. App. 60a—and proved that it caused a substantial adverse impact based on age. *Id.* at 59a. The court also determined that respondents offered a facially legitimate business justification for the IRIF: "to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions." *Ibid.* (citation omitted). The court concluded that petitioners nevertheless prevailed at the final step of the *Wards Cove* analysis, because "[a]t least one suitable alternative" practice was clear from the record: KAPL could have designed an IRIF with "tests for criticality and flexibility that were less vulnerable to managerial bias." *Id.* at 60a-61a & n.8.

Respondents petitioned for a writ of certiorari. In their petition, they sought review both of the court of appeals' conclusion that a disparate-impact age discrimination claim is available under the ADEA, and of the evidentiary standards the court applied in analyzing petitioner's claim in this case. Shortly thereafter, this Court issued its decision in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), in which it held that disparate-impact claims are cognizable under the ADEA. Following that decision, this Court granted the writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded for further proceedings. 544 U.S. 957 (2005).

3. On remand, a divided panel of the Second Circuit vacated the judgment of the district court and remanded the case with instructions to enter judgment for respondents. Pet. App. 1a-32a. The court concluded that the analysis it had employed in its earlier decision was now

"untenable" because, in *Smith*, the Supreme Court concluded that the business necessity test applicable in Title VII disparate-impact cases "is not applicable in the ADEA context." *Id.* at 9a (citing *Smith*, 544 U.S. at 243). Instead, the court of appeals explained, the "appropriate test [under *Smith*] is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals." *Ibid.* The court noted that the "reasonableness" test described in *Smith* "is derived primarily from" the provision of the ADEA that provides that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where the differentiation is based on reasonable factors other than age." *Id.* at 9a-10a & n.4 (quoting 29 U.S.C. 623(f)(1)).

In applying the "reasonableness" test to petitioners' disparate-impact claims, the court held, as a preliminary matter, that the ADEA plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable. Pet. App. 11a. The court based this holding on three considerations: (1) that *Smith* did not suggest that defendants must prove the RFOA, *id.* at 11a-12a; (2) that "[a]ny other interpretation would compromise the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the 'legitimacy' of its business justification," *id.* at 12a; and (3) that, because there may be a correlation between age and certain reasonable employment criteria, it "would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable," *id.* at 12a-13a.

The court of appeals concluded that respondents met their burden of producing evidence of a legitimate business justification not only for the IRIF, but also for the specific employment practice challenged by the plaintiffs. Pet. App. 15a. Specifically, the court found that respondents discharged their burden by presenting testimony that criteria such as flexibility and criticality were "ubiquitous components of 'systems for making personnel decisions,'" and that "the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Id.* at 16a.

The court of appeals concluded that petitioners did not, however, sustain their burden. The court noted that the reasonableness inquiry described in *Smith*, unlike the business-necessity inquiry applicable in the Title VII context, does not ask "whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class." Pet. App. 16a (quoting *Smith*, 544 U.S. at 243). While "[t]here may have been other reasonable ways for [respondent] to achieve its goals," the court concluded that petitioners had not demonstrated that "the one selected" was "unreasonable." *Id.* at 19a (citations omitted).

Judge Pooler dissented. Pet. App. 21a-32a. In her view, "existing cases, legislative history, and statutory structure overwhelmingly support the view that employers bear the burden of establishing a RFOA." *Id.* at 25a. She concluded that Congress's inclusion of the RFOA provision among the other exceptions to liability outlined in 29 U.S.C. 623(f), including circumstances in which "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(f)(1), indicates that RFOA,

like the "bona fide occupational qualification" (BFOQ) defense, is an affirmative defense as to which the defendant bears the burden of proof. Pet. App. 26a-30a.

DISCUSSION

A. Certiorari Is Warranted To Clarify Which Party Bears The Burden Of Proof On The ADEA's RFOA Exception

The court of appeals held that plaintiffs raising a disparate-impact age discrimination claim bear the burden of proof with respect to the ADEA's RFOA exception. That ruling is at odds with the text of the pertinent statutory provision, the decisions of other circuits, and agency regulations. In addition, the burden of proof on this issue is of threshold and recurring importance in ADEA disparate-impact cases. This Court's review of the first question presented is therefore warranted.

1. a. The ADEA's RFOA provision provides, in pertinent part: "It shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). The most natural construction of Section 623(f)(1) is that this exception for actions "otherwise prohibited" by Sections 623(a), (b), (c) and (e) of the statute constitutes an affirmative defense that comes into play only after the plaintiff has established that the employer has taken action that has a significant adverse effect on older workers, and permits the defendant to escape liability only if it can persuade the factfinder that its actions were justified or excusable.

This Court has recognized that the RFOA provision's neighboring exception in Section 623(f)(1) for actions

"otherwise prohibited" "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" is an affirmative defense, *Smith*, 544 U.S. at 233 n.3, to be established by the employer, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 416-417 & n.24 (1985); cf. *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (holding that defendant has the burden of proving a BFOQ under the similar language in Section 703(f)(1) of Title VII); *id.* at 221-222 (White, J., concurring). The courts of appeals have similarly characterized other exceptions appearing in Section 623(f) as affirmative defenses. See Pet. App. 28a-29a (Pooler, J., dissenting) (citing cases). Congress's placement of the RFOA exception among those exemptions from liability for actions "otherwise prohibited" by the substantive liability provisions of the statute strongly indicates that the RFOA, too, is an affirmative defense as to which the employer bears the burden of persuasion. See, *e.g.*, *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps.").[1]

Likewise, this Court has interpreted the similarly-worded exception in another employment discrimination statute, the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1), to establish an "affirmative defense on which the em-

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[1] As this Court long ago recognized, "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); see *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 57 (2005) ("[T]he burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions."). As noted, in this case, respondents pleaded the RFOA exception as a defense in their answer. Pet. App. 31a.

ployer has the burden of proof." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-197 (1974); see 29 U.S.C. 206(d)(1) (creating an exception to liability for differential pay "based on any other factor other than sex"); see also *Smith*, 544 U.S. at 239 n.11 (plurality opinion) (noting similarity, and one key difference, between the Equal Pay Act defense and the ADEA defense). As this Court has recognized, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith*, 544 U.S. at 233 (plurality opinion) (citing *Northcross* v. *Board of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam)). Like the Equal Pay Act, the ADEA assigns to employers the burden of establishing that otherwise unlawful actions are justified by factors other than discrimination against protected groups.

b. Consistent with the statutory language, the agencies responsible for enforcement of the ADEA have long interpreted the RFOA as an affirmative defense, with the burden of persuasion resting on the employer. In 1968, less than one year after passage of the ADEA, the Department of Labor (DOL), the agency then charged with enforcing the statute, promulgated a regulation providing that, "in accord with a long chain of decisions of the Supreme Court * * * with respect to other remedial labor legislation, all exceptions such as [RFOA] must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer." 29 C.F.R. 860.103(e) (1969).

When the Equal Employment Opportunity commission (EEOC) assumed responsibility for ADEA enforcement in 1979, it continued to construe the RFOA provi-

sion as an affirmative defense, as to which the employer bears the burden of proof. See 29 C.F.R. 1625.7(e) ("[T]he employer bears the burden of showing that the [RFOA] exists factually."); *Proposed Interpretations; Age Discrimination Employment Act*, 44 Fed. Reg. 68,861 (1979) ("The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer.").[2]

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[2] By its terms, 29 C.F.R. 1625.7(e) applies "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment." A separate subsection of the RFOA regulation provides: "When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. 1625.7(d). The court of appeals concluded (Pet. App. 13a n.6), based on this regulatory language, that the EEOC's interpretation of the RFOA provision as an affirmative defense to be established by the employer applies only in disparate-treatment cases, and not disparate-impact cases. The court of appeals' conclusion is incorrect.

There is no indication in either the statutory or the regulatory text that Congress or the EEOC intended there to be one burden of proof with respect to the RFOA provision in the disparate-treatment context and another in the disparate-impact context. From the outset, EEOC has made clear that the employer bears the burden of establishing RFOA in any age-discrimination case. 44 Fed. Reg. at 68,861. The current version of Section 1625.7(d) is simply the product of revisions intended "to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity." *Final Interpretations: Age Discrimination in Employment Act*, 46 Fed. Reg. 47,725 (1981). Although this Court later held that the plaintiff bears the burden of persuading the factfinder on the question of business necessity in a Title VII disparate-impact case, see *Wards Cove*, 490 U.S. at 659-660, the EEOC has continued to interpret the statute and regulations to make the ADEA's RFOA provision an affirmative defense as to which the employer bears the burden of persua-

To the extent there is any ambiguity in the statutory language of the ADEA, DOL's and EEOC's longstanding interpretation of the RFOA provision as an affirmative defense is entitled to deference. See, *e.g.*, *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988) (holding that the EEOC's reasonable interpretation of ambiguous language in Title VII warrants deference); accord *Smith*, 544 U.S. at 243 (Scalia, J., concurring). Deference is particularly appropriate where, as here, the interpretation is set forth in a regulation that was adopted soon after passage of the statute and has remained consistent thereafter. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

The EEOC has, moreover, consistently interpreted its regulations as assigning to the employer the duty to establish the applicability of the RFOA provision in both disparate-treatment and disparate-impact cases. See Gov't Br. as Amici Curiae Supporting Resp. at 23-27, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985) (No. 83-1545); EEOC Br. as Amicus Curiae at 5, 11, *Smith* v. *City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996) (No. 95-3802). In this case, the EEOC filed an amicus brief in the court of appeals in which it made clear that, under EEOC regulations, the RFOA provision is "an affirmative defense that the employer must establish." EEOC C.A. Br. 15. The EEOC's interpretation of its regulations, as explained in its amicus brief in this and other cases, is entitled to deference. See *Auer*

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sion. See pp. 11-12, *infra*. Moreover, that the regulation is written in an awkward fashion or even mistaken in some other particular is not a reason to ignore the EEOC's clear and consistent position that the burden of persuasion quite naturally lies with the defendant. See *Smith*, 544 U.S. at 247 (Scalia, J., concurring).

v. *Robbins*, 519 U.S. 452, 462 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).[3]

c. Although the court of appeals acknowledged that "there is some force" to the argument that the RFOA provision should be interpreted as an affirmative defense to be established by the employer, Pet. App. 13a, it held that this interpretation "does not withstand" this Court's decision in *Smith*, *id.* at 13a-14a.

In *Smith*, the Court considered the viability of a disparate-impact claim brought by senior police officers who were challenging a pay plan that granted proportionately higher raises to junior officers. In affirming dismissal of the claim, the Court held that disparate-impact claims are cognizable under the ADEA, but that the scope of ADEA disparate-impact liability "is narrower" than under Title VII, as amended by the Civil Rights Act of 1991. 544 U.S. at 238-242. The Court pointed in particular to two textual differences between Title VII and the ADEA. First, the Court noted that, after *Wards Cove*, Congress had amended Title VII to

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[3] Respondents contend that EEOC's views are not entitled to deference because *Smith* "effectively rejected" its regulations, and the EEOC "has reported publicly that it intends to revise its regulations * * * to conform to the decision in [*Smith*]." Br. in Opp. 20-21. This is incorrect. Although *Smith* does cast doubt on the language in 29 C.F.R. 1625.7(d) stating that a practice shown to have a disparate impact "can only be justified as a business necessity," see *Smith*, 544 U.S. at 243, it casts no doubt on the position of the EEOC and the DOL that the employer bears the burden of persuasion with respect to the RFOA provision. Cf. *Smith*, 544 U.S. at 247 (Scalia, J., concurring). The EEOC is in the process of reconsidering its regulations in light of issues related to *Smith*, but to be clear, the agency's position remains that the RFOA provision is an affirmative defense that the employer must establish. That the EEOC is considering whether other revisions to its regulations would be appropriate in light of *Smith* provides no reason to defer consideration of the first question presented by this case.

expand the scope of disparate-impact liability under that statute, but made no similar amendment to the ADEA. Accordingly, the Court stated, "*Wards Cove*'s pre-1991 interpretation of Title VII's *identical language* remains applicable to the ADEA." *Id.* at 240 (emphasis added). Second, the Court noted that the ADEA contains the RFOA provision, which has no parallel in Title VII. *Id.* at 238-239. In the Court's view, these textual differences suggest that Congress intended to "give older workers employment opportunities whenever possible" but also recognized that age, unlike race or sex, "not uncommonly has relevance to an individual's capacity to engage in certain types of employment," and "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.* at 240-241.

Turning to the facts in *Smith*, the Court concluded that plaintiffs could not make out a prima facie case because they failed to identify a specific employment practice that adversely affected older workers. 544 U.S. at 242. But even if they had, the Court concluded that dismissal of that action was appropriate because, in light of the employer's legitimate goals of attracting and retaining officers, the challenged practice was "unquestionably reasonable." *Id.* at 242.

Although *Smith* suggests that the business-necessity test is inapplicable to ADEA disparate-impact claims in which the RFOA provision may apply, *Smith* does not suggest, much less hold, that the plaintiff must bear the burden of persuasion with respect to the RFOA provision. As the court of appeals itself recognized (Pet. App. 11a-12a), given the obvious fit between the employer's goals and the means selected to achieve them, the Court in *Smith* had no occasion to resolve the question of

which party bears the burden of proof with respect to the RFOA provision, and nothing in the Court's decision proposes to resolve the issue.

Nor does *Smith*'s discussion of the textual differences between Title VII and the ADEA suggest a particular allocation of the burden of persuasion with respect to the ADEA's RFOA provision. *Smith*'s reference to *Wards Cove* sheds no light on that question, since, as the Court explicitly noted, Title VII—the statute at issue in Wards Cove—contains no analog to the ADEA's RFOA provision. 544 U.S. at 240. Accordingly, although *Wards Cove* may have continued significance in ADEA cases such as this one on matters such as the specificity of the practice challenged as having a disparate impact, the impact of the RFOA provision is not dictated by that decision.

And although the relationship between age and capacity to participate in certain types of employment may explain why Congress included an RFOA provision in the ADEA and not Title VII, see *Smith*, 544 U.S. at 240-241, that relationship has "no bearing on where the RFOA burden should rest," Pet. App. 31a (Pooler, J., dissenting). If anything, Congress's decision to include the RFOA exception provides a clear answer to the burden of proof question relative to Title VII, which lacked an analogous provision. After all, in contrast to the Court's efforts to allocate burdens of proof in the absence of clear textual directives in a case like *Wards Cove*, when the Court construed an analogous textual defense in Title VII, it had little difficulty concluding that the defendant bore the burden. See, *e.g.*, *Johnson Controls*, 499 U.S. at 206.

2. The Court's review of the first question presented is also warranted because several courts of appeals are

divided on this question. Like the court of appeals in this case, the Tenth Circuit has held in the wake of *Smith* that plaintiffs must "persuade the factfinder that the employer's asserted basis for the [challenged] neutral policy is *unreasonable*." *Pippin* v. *Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006); see Pet. App. 11a (citing *Pippin* for support).[4] At least two other circuits have held that the employee bears the burden of persuasion with respect to the RFOA exception, although they did so in cases involving disparate treatment and had no occasion to apply that holding in the disparate-impact context. See, *e.g.*, *Iervolino* v. *Delta Air Lines, Inc.*, 796 F.2d 1408, 1416 (11th Cir. 1986); *Marshall* v. *Westinghouse Elec. Corp.*, 576 F.2d 588, 590-592 (5th Cir. 1978).

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[4] Only two post-*Smith* appellate decisions, *Meacham* and *Pippin*, squarely place the burden of proving RFOA on plaintiffs. Respondents' citation to *Mattenson* v. *Baxter Healthcare Corp.*, 438 F.3d 763 (7th Cir. 2006), is inapposite. That case was tried to a jury under a disparate-treatment theory. The Seventh Circuit held, citing *Smith*, that under those circumstances it was error to instruct the jury on the RFOA exception. *Id.* at 767; see *Smith*, 544 U.S. at 238-239 ("In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place."). The court in *Mattenson* thus had no occasion to determine which party bears the burden of proving RFOA. The unpublished decisions in *Seasonwein* v. *First Montauk Sec. Corp.*, 189 Fed. Appx. 106 (3d Cir. 2006), and *Durante* v. *Qualcomm, Inc.*, 144 Fed. Appx. 603 (9th Cir. 2005), cited by respondents (Br. in Opp. 15-17), are also inapposite. In *Seasonwein*, the Third Circuit upheld the dismissal of the plaintiff's disparate-impact claim because he had failed to plead such a claim in his complaint, and did not reach the question of allocation of burdens with respect to the RFOA provision. 189 Fed. Appx. at 111. The Ninth Circuit in *Durante* had no occasion to decide the question of allocation of burdens because the employer's evidence of reasonableness in that case was unrebutted. 144 Fed. Appx. at 607.

By contrast, the Ninth Circuit has held that the employer bears the burden of establishing RFOA under the ADEA, just as it bears the burden with respect to the BFOQ provision. See *Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983). Respondents suggest (Br. in Opp. 16-17) that *Criswell* has been "effectively overruled" by later circuit precedent, *Durante* v. *Qualcomm*, 144 Fed. Appx. 603 (9th Cir. 2005), but that decision is unpublished (and thus non-precedential), and does not address the proper allocation of burdens as to the ADEA's RFOA provision.[5]

3. The question of the proper allocation of the burden of proof as to the RFOA exception is important and recurring. Indeed, this Court granted certiorari to address this issue in *Criswell*, but did not reach the issue because it determined that it was not properly presented in this case. 472 U.S. at 408 n.10; see Br. of AARP and the National Employment Lawyers Association as *Amicus Curiae* M-2 to M-3; *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958) ("In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome."). In addition, the court of appeals' deci-

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[5] As petitioners note, there is also language in cases from other circuits suggesting that establishing RFOA is defendant's burden. See, *e.g.*, *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975) (dicta citing Department of Labor regulation for view that employer had duty to prove RFOA where policy has disparate impact on older people). Although respondents contend that a later Sixth Circuit case, *Abbott* v. *Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990), "supports the view that an employer's burden in a disparate impact case under the ADEA is one of production only and not one of proof," Br. in Opp. 17, the Sixth Circuit in *Abbott* held, based on Supreme Court precedent, that an employer's burden of establishing *business necessity* is one of production only; it did not address the allocation of burdens with respect to *RFOA*. See *Abbott*, 912 F.2d at 872.

sion in this case rejects the longstanding administrative interpretation of the ADEA by the agencies charged with implementing the statute. Moreover, given that the courts of appeals that have placed the burden of proof on the plaintiff despite strong textual indications and administrative constructions to the contrary have all relied heavily on language from this Court's decision in *Smith*, intervention by the Court is necessary. If left unreviewed, the court of appeals' decision could upset the enforcement of the ADEA by limiting remedies for employment practices that have a disparate adverse impact on older workers, even if those practices have only a marginal relationship to an asserted business purpose.

4. This case is a suitable vehicle for resolving which party bears the burden of establishing RFOA, despite the fact that the case was framed and tried to the jury before *Smith*. A jury found that respondents were liable under the ADEA under a disparate-impact theory in connection with the loss of their jobs under an involuntary reduction in force in which 30 out of the 31 employees selected for layoff were over 40 years of age. Pet. App. 6a. The court of appeals initially affirmed the district court's denial of respondents' motion for judgment as a matter of law, but following a remand from this Court in light of *Smith*, the court of appeals—by a 2-1 vote—vacated the judgment of the district court and remanded with instructions to enter judgment as a matter of law in favor of respondents. A central point of disagreement among the panel was the allocation of the burden of proof on the RFOA exception. See *id.* at 11a-15a (panel majority); *id.* at 25a-31a (dissent). And the panel majority—which placed the burden of proof on the employee—acknowledged that there was evidence both ways. See *id.* at 16a-19a; see also *id.* at 32a (Pooler, J.,

dissenting) (a jury instructed that respondents bore the burden of proof on the RFOA defense "could permissibly find that [respondents] had not established a RFOA based on the unmonitored subjectivity of KAPL's plan as implemented").

As respondents note (Br. in Opp. 18-20), petitioners did not argue that respondents bore the burden of persuading the factfinder that the design and execution of the IRIF was based on RFOA. See Pet. Supp. C.A. Br. 13-14. Likewise, as the dissent notes (Pet. App. 31a-32a), although respondents pleaded RFOA as a defense, the jury was not specifically instructed on the issue, and respondents sought no such instruction.[6] However, the

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[6] As noted above, see pp. 2-3, *supra*, the jury was instructed, consistent with *Wards Cove*, that petitioners bore the burden of persuading the factfinder that respondents' asserted business justification was in fact a pretext for discrimination, and that petitioners could satisfy that burden by proving that an alternative employment practice would have been equally effective in achieving respondents' legitimate business objectives. After this Court remanded the case for reconsideration in light of *Smith*, the court of appeals held that the framework set out in the jury instructions was no longer good law. Pet. App. 10a. Given that change in the law, the court proceeded to consider the "reasonableness" of respondents' asserted business justification under the RFOA exception, and somewhat anomalously found the *Smith* decision to require setting aside the jury's verdict in favor of the plaintiff that had been affirmed pre-*Smith*. *Id.* at 11a-19a.

In dissent, Judge Pooler asserted that respondents' failure to seek a jury instruction on the RFOA exception constituted waiver of that argument, absent "fundamental error." Pet. App. 31a. Judge Pooler acknowledged, however, that the question whether respondents' failure to seek an RFOA instruction constitutes waiver of the argument turns on whether the RFOA exception is properly characterized as an affirmative defense that is the employer's burden to establish. *Id.* at 31a-32a. And assuming the RFOA exception is an affirmative defense, petitioners should not be faulted for not objecting to the *absence* of a RFOA instruction (including an instruction on the burden of proving

proper allocation of burdens with respect to the RFOA provision was addressed in the amicus brief filed by the EEOC and, more to the point, the court of appeals squarely addressed the issue in its opinion. Pet. App. 11a. Reviewing the record, the court determined that respondents had raised a legitimate, non-age-based justification for its challenged employment practices, and that plaintiffs had not satisfied their burden of demonstrating that the justification was unreasonable. See *id.* at 11a-19a. In this Court, petitioners have clearly presented the question whether the employer, or employee, bears the burden of persuasion on the RFOA exception, Pet. i, and argued that the court of appeals erred in assigning the burden to them. In addition, that issue is squarely contested by the parties in this Court. Review is therefore appropriate. See *United States* v. *Williams*, 504 U.S. 36, 42, 43 (1992).

B. Certiorari Is Not Warranted To Decide Whether The Exercise Of Supervisorial Discretion Constitutes A RFOA As A Matter Of Law

The petition raises a second question as to whether conferring discretion on managers to make employment decisions constitutes a RFOA as a matter of law. This Court's review of that question is not warranted.

Contrary to petitioners' argument, the court of appeals decision on this issue does not conflict with this Court's decision in *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988). *Watson* was a Title VII case in which this Court held that "subjective or discretionary

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the RFOA exception). Ultimately, the court of appeals set aside the jury verdict based on its conclusion that, regardless of how the jury was instructed, petitioners bore the burden of disproving the RFOA. The correctness of that ruling is squarely before the Court.

employment practices may be analyzed under the disparate impact approach in appropriate cases." *Id.* at 991. The court of appeals' decision does not establish a general legal principle that subjective or discretionary employment practices fall outside the reach of disparate-impact theory; it instead holds, based on the present record, that the measures that respondents employed to prevent arbitrary decisionmaking, "while not foolproof[,] were substantial," and therefore satisfy the reasonableness test as the court of appeals understood it. Pet. App. 19a; see also *id.* at 9a ("[T]he appropriate test is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals."). In addition, the court of appeals' decision does not conflict with any other circuit decision on this issue.

Petitioners focus on (Pet. 26-28) the court of appeals' statement that "[a]ny system that makes employment decisions in part on such subjective grounds as flexibility and criticality * * * advances business objectives that will usually be reasonable"—"at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees." Pet. App. 19a. But the remainder of the pertinent discussion makes clear that the court properly recognized that the reasonableness inquiry requires consideration of the reasonableness of both ends and means. In any event, the second question presented is fact-bound and splitless, and does not warrant plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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DECEMBER 2007

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No. 06-1505

IN THE
SUPREME COURT OF THE UNITED STATES

Clifford B. Meacham *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

AARP and the National Employment Lawyers Association (NELA) move for leave to file the accompanying brief *amici curiae* in support of the Petitioners whose case is before the Court on a Petition for a Writ of Certiorari from the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Pursuant to Supreme Court Rule 37.2(b), through counsel *amici* sought the consents of the parties to the filing of this brief. Counsel for the Petitioners gave consent, but counsel for the Respondents withheld consent.

INTEREST OF *AMICI CURIAE*

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 38 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, and various state laws. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a current membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the work place. NELA advocates for

employee rights and work place fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

Both AARP and NELA have filed numerous *amicus curiae* briefs before this Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws ensuring full enforcement of the laws and full protection of the rights of workers. In addition, both organizations filed *amicus curiae* briefs with this Court in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005), and with the court below in this case concerning the applicability and appropriate standard for disparate impact claims under the ADEA.

REASONS FOR GRANTING THE MOTION

Amici are concerned that lower courts, as evidenced by the decision by the Second Circuit in this case, are confused by the question of which party bears the burden of proof in a disparate impact case under the ADEA in which the "reasonable factor other than age" provision plays a central role. In addition, despite this Court's holding in *Smith* that the ADEA authorizes claims of disparate impact, the Court did not expound upon the elements of such a claim, particularly the meaning of "reasonable." Unless this Court provides guidance on the burden of proof and defines "reasonable" as a meaningful standard, it is unlikely that any plaintiff will be able to state a cognizable disparate impact claim under the ADEA. As a result, employers will be able to discriminate at will based on factors that, as in this case," adversely impact older workers with "startingly skewed results," *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56, 75 (2d Cir. 2004), even if the factor has only a marginal relationship to a business purpose.

Given that during the first decade of this century, the number of workers age 55 and older is expected to increase by

46 percent from 18.2 million to 26.6 million,[1] this issue will continue to grow in importance. *Amici* urge the Court to grant the Petition to provide courts with clear and definitive guidance concerning the standard and burden of proof for disparate impact claims under the ADEA.

June 14, 2007

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[1] Jerry W. Hedge, Walter C. Borman, Steven E. Lammlein, THE AGING WORKFORCE, 9 (American Psychological Assoc. 2006).

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Jerry W. Hedge, Walter C. Borman, Steven E. Lammlein, THE AGING WORKFORCE (American Psychological Assoc. 2006) M-3

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS[2]

INTERESTS OF *AMICUS CURIAE*[3]

SUMMARY OF THE ARGUMENT

In *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005), this Court held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, authorizes disparate impact claims. *Smith* also established that the standard for determining the lawfulness of a practice that disproportionately affects older workers is the "reasonable factor other than age" provision found in § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1).[4] Significantly, however, the

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[2] In compliance with Rule 37.6 of this Court, *amici curiae* AARP and NELA state that no counsel for any party authored this brief in whole or in part, and that no party or entity other than these *amici curiae*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

[3] *Amici Curiae* have described their interest in the accompanying Motion of AARP and National Employment Lawyers Association (NELA) for Leave to File a Brief *Amici Curiae* which precedes this Brief, and does not repeat the same in this section of the Brief.

[4] Section 4(f)(1) of the ADEA states:

"It shall not be unlawful for an employer, employment agency, or labor organization - -

> (1) to take any action otherwise prohibited under subsection (a), (b), (c, or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the

majority opinion in *Smith* did not state which party has the burden of proof with respect to whether a practice is based on a "reasonable factor other than age."

The question of which party bears the burden of proof regarding the ADEA's "reasonable factor other than age" provision (hereinafter RFOA) has never been definitively resolved. Although Congress, the Equal Employment Opportunity Commission (EEOC), and numerous federal courts have weighed in on the issue, there is no agreement. In *Western Air Lines, Inc. v. Criswell*, this Court granted *certiorari* to consider the burden of proof applicable to the RFOA provision, but declined to reach the issue. 472 U.S. 400, 408 n.10 (1985).

The *Smith* Court also failed to provide a clear definition of "reasonable" when a factor other than age is used as a defense to a disparate impact claim under the ADEA. While the Court did provide some guidance establishing that "reasonable" is not a superficial standard that can be readily satisfied by any explanation proffered by an employer, it is clear from the decision of the Second Circuit in this case, as well as other lower court decisions attempting to interpret the *Smith* decision when deciding disparate impact claims under the ADEA, that more definitive guidance is needed.

Prior to *Smith*, the RFOA provision was not the subject of much litigation. However, when this Court ruled in *Smith* that the disparate impact theory is available under the ADEA and that the RFOA provision plays a "principal role," which is to "preclud[e] liability if the adverse impact was attributable to a nonage factor that was 'reasonable,'" 544 U.S. at 239, it took on heightened significance. Accordingly, it is imperative that this Court grant the petition to resolve the uncertainties surrounding the "reasonable factor other than age" provision and to provide much-needed guidance to the lower courts.

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differentiation is based on reasonable factors other than age."

29 U.S.C. § 623(f)(1) (2000).

ARGUMENT

I. THIS COURT SHOULD ELIMINATE THE CONFUSION SURROUNDING THE QUESTION OF WHICH PARTY MUST PROVE OR DISPROVE THE "REASONABLENESS" OF AN EMPLOYER PRACTICE THAT ADVERSELY IMPACTS OLDER WORKERS.

The question of which party bears the burden of proof regarding the ADEA's "reasonable factor other than age" provision is fraught with confusion. The court below, lacking clear guidance from this Court as to who bears the burden of proof with respect to the "reasonableness" of the nonage factor that adversely impacted the protected age group, was left to resort to what it considered to be "[t]he best reading of the text of the ADEA - in light of *City of Jackson* and *Wards Cove* [*Packing Co. v. Antonio*, 490 U.S. 642 (1989)] . . . ." *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134, 141 (2d Cir. 2006). After conceding that there "is some force" to the argument that the RFOA provision is an affirmative defense, the Second Circuit nevertheless surmised that "the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable." *Id.* While the Second Circuit's conjecture about who must prove or disprove "reasonableness" is in accord with the U.S. Court of Appeals for the Tenth Circuit's decision in *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006), it conflicts with guidance from this Court; Congress; other federal circuits; and the Equal Employment Opportunity Commission (EEOC).

In *Western Air Lines, Inc. v. Criswell*, the Court determined that it was unnecessary to decide one of the issues on which it had granted certiorari - whether the RFOA provision constitutes an affirmative defense. 472 U.S. 400, 408 n.10 (1985). However, earlier in the same term, the Court had referred in passing to the RFOA provision as an affirmative defense. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (stating that the ADEA contains "five affirmative defenses). And, most recently, Justice Scalia referred to the RFOA provision as a "defense" in *Smith*. 544 U.S. at 246

(Scalia, J., concurring) ("... the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA.") (emphasis in original). Given the RFOA now has a "principal role" to play in analyzing disparate impact claims under the ADEA, it is imperative that this Court offer more than subtle "hints" about the nature of the RFOA provision and provide a definitive answer to the question of who bears the burden of proving or disproving "reasonableness."

Even before this Court elevated the importance of the RFOA provision, the courts were split on the question of whether the RFOA language constitutes an affirmative defense.[2/] The division persists now with much greater implications because of the increased significance of the RFOA provision. In addition to the court below, the Tenth Circuit, in a post-*Smith* decision, held that "[T]o prevail on an ADEA disparate impact claim, an employee must ultimately persuade the factifinder that the employer's asserted basis for the neutral policy is *unreasonable*." *Pippin*, 440 F.3d at 1200 (emphasis in original). However, in sharp contrast, in *Williams v. Sprint/United Management Co.*, the court ruled that "Plaintiffs have no obligation to plead anything at all with respect to the RFOA defense - *a defense that is defendant's burden to plead and prove.*" 2005 WL 1801605 at *3 (D. Kan. July 29, 2005) (emphasis added).

[2/] *Compare Equal Employment Opportunity Comm'n v. Westinghouse Elec. Corp.*, 725 F.2d 211, 222-23 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-91 (5th Cir. 1978); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979); and *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1415-16 (11th Cir. 1986), *cert. denied*, 479 U.S. 1090 (1987) (cases holding that the RFOA is not an affirmative defense) *with EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 648 (9th Cir. 1992) (holding that the RFOA is an affirmative defense but rejecting it as a valid defense to union hiring hall policy that required retirees to cease receiving pensions, since pension receipt was conditioned on age).

Litigants struggling to determine who bears the burden of proving or disproving "reasonableness" must also take into consideration counsel from Congress. The legislative history of the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990), provides compelling support for the conclusion that the RFOA is an affirmative defense. In response to the Supreme Court construing the former language in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2) as placing the burden of proof on plaintiffs,[9] Congress copied the language from § 4(f)(1) to ensure that the new § 4(f)(2) would be interpreted as an affirmative defense:

> The Committee intends that the amendments made by the bill to section 4(f)(2) . . . should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defenses, section 4(f)(1). Accordingly, the language of section 4(f) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . *to take any action otherwise prohibited*" by the ADEA (emphasis added) should be applied to the revised section 4(f)(2) . . . The Committee [ ] endorses the position of the EEOC that the "reasonable factors other than age" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (*See* 29 C.F.R. § 1625.7), and expresses approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception.

1 LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, at 253-54 (1990).

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[9] *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989) (construing the language "It shall not be unlawful for an employer . . . to observe the terms of . . . a bona fide employee benefit plan . . . .").

The question of which party bears the burden of proving or disproving reasonableness is also addressed by the EEOC's regulations governing the RFOA provision. While this Court rejected the business necessity component in the EEOC's regulations at 29 C.F.R. § 1625.7(e), *Smith*, 544 U.S. at 243, it did not speak to any of the other provisions of the regulations which it viewed as authorizing a disparate impact claim. The original Department of Labor interpretations stated both the BFOQ and RFOA defenses in ADEA § 4(f)(1) "must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer. . . ." 29 C.F.R. § 860.102(b), 860.103(e), 33 Fed. Reg. 9173 (1968). This contemporaneous interpretation is entitled to great weight. *Dothard v. Rawlinson*, 433 U.S. 321, 334 n.19 (1977) (an agency's 1965 interpretation of statutory language, consistently adhered to, should be given weight). When the EEOC assumed responsibility for the enforcement of the ADEA, it continued to view the RFOA exception as an affirmative defense. EEOC regulations state that "the employer bears the burden of showing that the 'reasonable factor other than age' exists factually," 29 C.F.R. § 1625.7(e)(2004), which would impose a burden of proof.

Finally, the most common reason given in support of concluding that plaintiffs bear the burden of proving an employer's practice is "unreasonable' is that in *Smith*, this Court stated that because the ADEA was not amended by the Civil Rights Act of 1991, 105 Stat. 1071, "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240. However, rather than helping to sort out the confusion surrounding who bears the burden of proof in disparate impact cases under the ADEA, this factor only muddies the issue further.

Smith stated that *Wards Cove* only applies to language in the ADEA that is "identical" to language in Title II. *Id.* However, there is nothing even remotely similar to the ADEA's RFOA provision in Title VII, let alone "identical." Accordingly, this Court's directive that *Wards Cove* should be applied to interpret language in the ADEA that is identical to language in Title VII is not at all helpful in determining which

party must prove or disprove "reasonableness." Indeed, this Court suggested as much itself when it stated, "*[A] difference in the text of the statute* such as the RFOA provision, may warrant addressing disparate-impact claims in the two statutes [the ADEA and Title VII] differently. . . ." *Smith*, 544 U.S. at 236 n.7 (emphasis in original).

Instead, the language and context of the ADEA strongly support characterizing the RFOA as an affirmative defense. The RFOA provision begins with a specific proviso: "to take any action otherwise prohibited." 29 U.S.C. § 623(f)(1). This prefatory phrase means that the RFOA provision does not come into play until a violation of an ADEA prohibition has been established. When a party seeks to have a violation excused by asserting an exception to liability, that party typically bears the burden of proving that its conduct falls within the exception. *See United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967) (asserting as a general rule that the party claiming the benefits of an exception bears the burden of proof).

As discussed above, Congress views the prefatory language "to take any action otherwise prohibited" as creating an affirmative defense. Based on its understanding of this proviso, Congress added this precise language to ADEA § 4(f)(2) in the OWBPA, to eliminate any doubt that it is an affirmative defense for which the employer bears the burden of proof.

The placement of a provision within the context of the statute provides particular insight into its meaning. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). The RFOA provision of the ADEA is sandwiched between the BFOQ provision and the foreign workplace provision. The Court has repeatedly held that the BFOQ provision is an affirmative defense. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n.24 (1985) (citing 29 C.F.R. § 1625.6(b) (1984), which lists three prongs a defendant must satisfy for the BFOQ defense); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (listing the BFOQ argument as an affirmative defense). The foreign workplace provision has also been

recognized as an affirmative defense.[7] The contiguous placement of the RFOA provision with the ADEA's other affirmative defenses, strongly suggests that it too is an affirmative defense.

Finally, requiring plaintiffs who have already succeeded in showing the existence of a clearly discriminatory policy to carry the additional burden of proving the absence of a "reasonable factor other than age" would be extremely detrimental to older workers and would significantly weaken the protections against age-based discrimination found in the ADEA. It would allow employers to merely articulate "other factors" without being obligated to prove them. Where age discrimination has been shown, the RFOA defense must constitute more than a mere denial of such discrimination. Otherwise, employers may discriminate against older workers practically at will.

II. THE SECOND CIRCUIT'S DECISION THAT SUBJECTIVE DECISIONMAKING IS "UNQUESTIONABLY REASONABLE" IS INCOMPATIBLE WITH *WATSON v. FORT WORTH BANK & TRUST.*

In *Smith*, a plurality of this Court held that the RFOA provision is "not . . . a safe harbor from liability." 544 U.S. at 238. Rather, the RFOA provision precludes liability only if the "adverse impact was attributable to a nonage factor that was 'reasonable.'" *Id.* at 239. This Court clearly demonstrated its view that not every employer practice or policy can be "reasonable" by juxtaposing the RFOA provision with the Equal Pay Act's provision that precludes liability "if a pay differential was based on 'on any other factor' – reasonable or unreasonable," 544 U.S. at 239 n.11, and by stating that "[t]he fact that Congress provided that employers could only use

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[7] *See Mahoney v. Radio Free Europe/Radio Liberty, Inc.*, 818 F. Supp. 1,4 (D.D.C. 1992), *rev'd on other grounds*, 47 F.3d 447 (D.C. Cir. 1995) (construing foreign employee provision as an affirmative defense).

reasonable factors in defending a suit under the ADEA is . . . instructive." *Id.* (emphasis in original). Unfortunately, however, this Court did not expound on the meaning of the term "reasonable" other than by stating that "the scope of disparate-impact liability under the ADEA is narrower than under Title VII." 544 U.S. at 240. This lack of guidance opens the door for lower courts to treat the RFOA provision as a free pass for employers to justify conduct that adversely impacts older workers.

Indeed, that is exactly what happened in the court below as the Second Circuit sanctioned the defendant's use of subjective criteria fraught with managerial bias as "reasonable." Prior to *Smith*, the Second Circuit in this case recognized that the subjectivity of the factors the defendant used to make termination decisions - "criticality" and "flexibility" - made them vulnerable to age-related bias. *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d at 75. Moreover, "the subjectivity disproportionately impacted older employees," and "the employer observed that the disproportion was gross and obvious. . ." *Id.* In the face of such "startlingly skewed results," *id.* n.8, the Second Circuit ruled that the defendant's "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" *id.*, to make termination decisions had a disparate impact based on age in violation of the ADEA. After *Smith*, the Second Circuit executed an about face and held that while "[a]ny system that makes employment decisions in part on such subjective grounds as flexibility or criticality may result in outcomes that disproportionately impact older workers; . . . such a system . . . will usually be reasonable." *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d at 146. This laissez-faire reading of the RFOA provision erects an insurmountable hurdle to disparate impact challenges to subjective decisionmaking under the ADEA and conflicts with this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

In *Watson v. Fort Worth Bank & Trust*, the Court noted that the disparate impact theory is necessary to "adequately police . . . the problem of subconscious stereotypes and

prejudices." 487 U.S. 977, 990 (1988).[9] Given that the Court has also stated that the "essence of age discrimination" is older workers being harmed by "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), the Second Circuit's ruling that employment decisions based on subjective criteria that were admittedly vulnerable to "managerial bias" renders the *Smith* decision meaningless and effectively insulates from challenge age discrimination that results from unconscious prejudice and stereotyping. "Allowing an employer to escape liability simply by articulating vague, inoffensive-sounding subjective criteria would disserve [the ADEA's] goal of eradicating discrimination in employment . . . Such a rule would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities." *Watson*, 487 U.S. at 1009-1010 (J. Blackmun, concurring) (footnote omitted).

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[9] *See also Alexander v. Choate*, 469 U.S. 287, 292-99 (1985) (discussing the *appropriateness* of disparate impact analysis under § 504 of the Rehabilitation Act 29 U.S.C. § 791 *et seq.*, since discrimination against the disabled often results from thoughtlessness not animus).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

June 14, 2007

Respectfully Submitted,

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6

No. 06-1505

IN THE

Supreme Court of the United States

Clifford B. Meacham, *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory, *et al.*

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 9, 2007
CERTIORARI GRANTED JANUARY 18, 2008

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APPENDIX A

U.S. District Court for the Northern District of New York

Case # 1:97-cv-00012-DRH

Meacham, et al v. Knolls Atomic Power, et al

Assigned to:
Magistrate Judge
David R. Homer

Demand:
$50,000,000

Case in other court:
02-07378(L) and
02-7474(XAP)

Cause: 29:621
Job Discrimination (Age)

Date Filed:
01/06/1997

Date Terminated:
12/05/2000

Jury Demand:
Plaintiff

Nature of Suit: 442
Civil Rights: Jobs

Jurisdiction:
Federal Question

Plaintiff	Represented by
Thedrick L. Eighmie *Individually and on behalf of all other persons similarly situated*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff	Represented by
Allen G. Sweet *Individually and on behalf of all other persons similarly situated*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
PhD. James R. Quinn	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
Deborah L. Bush	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
Hildreth E. Simmons, Jr. *TERMINATED: 10/02/2000*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
Raymond E. Adams	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Consol Plaintiff	Represented by
Wallace Arnold	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Consol Plaintiff	Represented by
Henry Bielawski *TERMINATED: 10/27/2000*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Consol Plaintiff	Represented by
Ronald G. Butler, Sr.	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
William F. Chabot	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Consol Plaintiff	Represented by
James S. Chambers *TERMINATED: 09/28/2000*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Consol Plaintiff	
Allen E. Cromer	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Consol Plaintiff	
Paul M. Gundersen	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
Arthur J. Kaszubski *TERMINATED: 09/28/2000*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
David J. Kopmeyer *TERMINATED: 09/28/2000*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
Clifford J. Levendusky	**John B. DuCharme** (See above for address) *LEAD ATTORNEY ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
Bruce E. Palmatier	**John B. DuCharme** (See above for address) *LEAD ATTORNEY ATTORNEY TO BE NOTICED*

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Consol Plaintiff	Represented by
Frank A. Paxton *TERMINATED: 09/28/2000*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Consol Plaintiff	Represented by
Janice M. Polsinelle	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
William C. Reynheer	**John B. DuCharme** (See above for address) *LEAD ATTORNEY ATTORNEY TO BE NOTICED*
Consol Plaintiff	Represented by
John K. Stannard	**John B. DuCharme** (See above for address) *LEAD ATTORNEY ATTORNEY TO BE NOTICED*
Consol Plaintiff	Represented by
David W. Townsend	**John B. DuCharme** (See above for address) *LEAD ATTORNEY ATTORNEY TO BE NOTICED*
Consol Plaintiff	Represented by
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Consol Plaintiff	Represented by
Bruce E. Vedder *TERMINATED: 09/28/2000*	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Consol Plaintiff	Represented by
Carl T. Woodman	**John B. DuCharme** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Defendant	Represented by
Knolls Atomic Power Laboratory *also known as* KAPL, Inc.	**John E. Higgins** Nixon, Peabody Law Firm - Albany Office Omni Plaza, Suite 900 30 South Pearl Street Albany, NY 12207 518-427-2650 Fax: 518-427-2666 Email: JEHiggins@nixonpeabody.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

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Defendant	Represented by
John J. Freeh *both individually and as an employee of KAPL and Lockheed Martin*	**John E. Higgins** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Michael R. Zeller
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/06/1997	1	COMPLAINT filed; FILING FEE $ 150.00 RECEIPT # 27993; Service deadline 3/7/97 for John J. Freeh, for Lockheed Martin, for Knolls Atomic Power (fce) (Entered: 01/06/1997)
02/28/1997	5	ANSWER to Complaint by Knolls Atomic Power, Lockheed Martin, John J. Freeh (Attorney Michael R. Zeller) (fce) (Entered: 02/28/1997)
02/28/2000	59	MEMORANDUM-DECISION AND ORDER granting defendants' [54-1] motion to bifurcate the liability and damages phases of the trial of the above captioned case pursuant to FRCP 42(b), The trial of the liability phase shall commence on the previously scheduled date for commencement of trial of June 20, 2000 at 9:30 a.m. , The trial

		of the damages phase, if necessary, shall commence before the same jury on a date to be determined at the conclusion of the liability phase (signed by Magistrate Judge David R. Homer on 2/28/00) (jel) (Entered: 02/29/2000)
06/13/2000	67	Proposed Jury instructions/Requests to Charge by Michael R. Zeller, Esq., for Knolls Atomic Power, Lockheed Martin, John J. Freeh (jel) (Entered: 06/13/2000)
06/14/2000	71	Proposed Jury instructions/Charge to Jury by John B. DuCharme, Esq., for Clifford B. Meacham, Thedrick L. Eighmie, Allen G. Sweet, James R. Quinn, Deborah L. Bush, Hildreth E. Simmons Jr., Raymond E. Adams, Wallace Arnold, Henry Bielawski, Ronald G. Butler Sr., William F. Chabot, James S. Chambers, Allen E. Cromer, Paul M. Gundersen, Arthur J. Kaszubski, David J. Kopmeyer, Clifford J. Levendusky, Bruce E. Palmatier, Christine A. Palmer, Neil R. Pareene, Frank A. Paxton, Janice M. Polsinelle,

		William C. Reynheer, John K. Stannard, David W. Townsend, Teofils F. Turlais, Bruce E. Vedder, Carl T. Woodman (jel) (Entered: 06/14/2000)
07/24/2000	87	TRANSCRIPT OF PROCEEDINGS filed for the date of 4/14/00 before Judge David R. Homer in Albany. Appearances Made: John Ducharme and Joseph Berger, Esqs., for the plaintiffs; Michael Zeller, Alesia J. Kantor and John Higgins, Esqs., for the defendants. (jel) (Entered: 07/31/2000)
07/26/2000	85	Jury instructions (jel) (Entered: 07/26/2000)
07/26/2000	86	JURY VERDICT (jel) (Entered: 07/26/2000)
10/12/2000	119	JURY VERDICT for Clifford B. Meacham, James R. Quinn, Wallace Arnold, William C. Reynheer (jel) (Entered: 10/13/2000)
11/01/2000	124	SPECIAL JURY VERDICT FORM as to Allen Sweet, William Chabot, Allen Cromer, Clifford Levendusky and Neil Pareene. (jel) (Entered: 11/01/2000)

12/05/2000	131	JUDGMENT/ORDER, All defendants are granted judgment on all claims as to plaintiffs Ronald Butler, Sr. and Janice Polinelle , All defendants are granted judgment as to all plaintiffs on plaintiffs' disparate treatment theory of age discrimination under the Age Discrimination in Employment Act and the New York Human Rights Law , The plaintiffs listed below are granted judgment against (a) defendants Knolls Atomic Power Laborartory and Lockheed Martin, Inc. on plaintiffs' disparate impact theory of age discrimination under the Age Discrimination in Employment Act; (b) defendants Knolls Atomic Power Laboratory, Lockheed Martin, Inc. and John J. Freeh under the new York Human Rights Law; and (c) all three defendants as to the palintiffs listed below on the plaintiffs' claims for liquidated damages based on the finding that the defendants each acted willfully; and the plaintiffs listed below are each awarded judgment for

damages against all three defendants in the total amounts listed below for each plaintiff: 1. Raymond Adams Back Pay: $20,911.26; Liquidated Damages: $20,911.26; Front Pay: 75,205.01; Emotion Distress-Past: $198,400.00; Emotional Distress-Future: $96,395.60; Total: $411,823.13; 2. Wallace Arnold: Back Pay: $172,899.95; Liquidated Damages: $172,899.95; Front Pay: $62,247.50; Emotional Distress-Past: $75,000.00; Emotional Distress-Future: $43,778.41; Total: $526,825.81; 3. Deborah L. Bush: Back Pay: $32,152.97; Liquidated Damages: $32,152.97; Front Pay: $70,625.15; Emotional Distress-Past: $67,800.00; Emotional Distress-Future: $43,778.41; Total: $246,509.50; 4. William R. Chabot: Back Pay: $0.00; Liquidated Damages: $0.00; Front Pay: $0.00; Emotional Distress-Past: $110,000.00; Emotional Distress-Future: $9,734.85; Total: $119,734.85; 5. Allen E. Cromer: Back Pay: $17,326.06;

Liquidated Damages: $17,326.06; Front Pay: $0.00; Emotional Distress-Past: $65,000.00; Emotional Distress-Future: $9,734.85; Total: $109,386.97; 6. Thedrick L. Eighmie: Back Pay: $25,585.00; Liquidated Damages: $25,585.00; Front Pay: $0.00; Emotional Distress-Past: $40,275.00; Emotional Distress-Future: 0.00; Total: $91,445.00; 7. Paul M. Gundersen: Back Pay: $14,820.15; Liquidated Damages: $14,820.15; Front Pay: $0.00; Emotional Distress-Past: $86,800.00; Emotional Distress-Future: $43,778.41; Total: $160,218.71; 8. Clifford J. Levendusky: Back Pay: $21,461.17; Liquidated Damages: $21,461.17; Front Pay: $0.00; Emotional Distress-Past: $120,000.00; Emotional Distress-Future: $27,683.21; Total: $190,605.55; 9. Clifford B. Meacham: Back Pay: $0.00; Liquidated Damages: $0.00; Emotional Distress-Past: $125,000.00; Emotional Distress-Future: $0.00; Total: $125,000.00; 10: Bruce E.

Palmatier: Back Pay: $2,841.28; Liquidated Damages: $2,841.28; Front Pay: $13,211.05; Emotional Distress-Past: $206,500.00; Emotional Distress-Future: $106,732.48; Total: $332,126.09; 11. Christine A. Palmer: Back Pay: $11,281.25; Liquidated Damages: $11,281.25; Emotional Distress-Past: $56,250.00; Emotional Distress-Future: $0.00; Total: $78,812.50; 12. Neil R. Pareene: Back Pay: $63,050.37; Liquidated Damages: $63,050.37; Front Pay: $0.00; Emotional Distress-Past: $130,000.00; Emotional Distress-Future: $27,683.21; Total: $283,783.95; 13. James R. Quinn: Back Pay: $12,460.00; Liquidated Damages: $12,460.00; Front Pay: $0.00; Emotional Distress-Past: $44,000.00; Emotional Distress-Future: $0.00; Total: $68,921.04; 14. William C. Reynheer: Back Pay: $179,740.17; Liquidated Damages: $179,740.17; Front Pay: $62,247.50; Emotional Distress-Past: $539,220.51;

Emotional Distress-Future: $114,276.73; Total: $1,115,357.58; 15. John K. Stannard: Back Pay: $58,242.97; Liquidated Damages: $58,242.97; Front Pay: $0.00; Emotional Distress-Past: $122,750.00; Emotional Distress-Future: $18,953.46; Total: $258,189.40; 16. Allen G. Sweet: Back Pay: $0.00; Liquidated Damages: $0.00; Front Pay: $0.00; Emotional Distress-Past: $110,000.00; Emotional Distress-Future: $18,953.46; Total: $128,953.46; 17. David W. Townsend: Back Pay: $18,126.82; Liquidated Damages: $18,126.82; Front Pay: $25,121.50; Emotional Distress-Past: $248,000.00; Emotional Distress-Future: $88,107.77; Total: $397,482.91; 18. Carl T. Woodman: Back Pay: $33,920.18; Liquidated Damages: $33,920.18; Front Pay: $42,344.21; Emotional Distress-Past: $182,168.95; Emotional Distress-Future: $139,755.36; Total: $432,108.88 (signed by Magistrate Judge David R. Homer on 12/5/00) (jcl) (Entered: 12/06/2000)

12/11/2000	133	AMENDED JUDGMENT/ORDER, All defendants are granted judgment on all claims as to plaintiffs Ronald Butler, Sr. and Janice Polsinelle , All defendants are granted judgment as to all plaintiffs on plaintiffs' disparate treatment theory of age discrimination under the Age Discrimination in Employment Act and the New York Human Rights Law , The plaintiffs listed below are granted judgment against defendant KAPL, Inc. and Lockheed Martin Corporation on plaintiffs' disparate impact theory of age discrimination under the Age Discrimination in Employment Act and the New York Human Rights Law, and on plaintiffs' claims for liquidated damages based on the finding that KAPL, inc. and Lockheed Martin Corporation each acted wilfully; and the plaintiffs listed below are each awarded judgment for damages against defendants KAPL, Inc. and Lockheed Martin Corporation in the total amounts listed belwo for each

plaintiff 1. Raymond Adams: Back Pay: $20,911.26; Liquidated Damages: $20,911.26; Front Pay: $75,205.01; Emotional Distress-Past: $198,400.00; Emotional Distress-Future: $96,395.60; Total: $411,823.13; 2. Wallace Arnold: Back Pay: $172,899.95; Liquidated Damages: $172,899.95; Front Pay: $62,247.50; Emotional Distress-Past: $75,000.00; Emotional Distress-Future: $43,778.41; Total: $526,825.81; 3. Deborah L. Bush: Back Pay: $32,152.97; Liquidated Damages: $32,152.97; Front Pay: $70,625.15; Emotional Distress-Past: $67,800.00; Emotional Distress-Future: $43,778.41; Total: $246,509.50; 4. William R. Chabot: Back Pay: $0.00; Liquidated Damages: $0.00; Front Pay: $0.00; Emotional Distress-Past: $110,000.00; Emotional Distress-Future: $9,734.85; Total: $119,734.85; 5. Allen E. Cromer: Back Pay: $17,326.06; Liquidated Damages: $17,326.06; Front Pay: $0.00; Emotional Distress-Past:

$65,000.00; Emotional Distress-Future: $9,734.85; Total: $109,386.97 6. Thedrick L. Eighmie: Back Pay: $25,585.00; Liquidated Damages: $25,585.00; Front Pay: $0.00; Emotional Distress-Past: $40,275.00; Emotional Distress-Future: $0.00; Total: $91,445.00; 7. Paul M. Gundersen: Back Pay: $14,820.15; Liquidated Damages: $14,820.15; Front Pay: $0.00; Emotional Distress-Past: $86,800.00; Emotional Distress-Future: $43,778.41; Total: $160,218.71; 8. Clifford J. Levendusky: Back Pay: $21,461.17; Liquidated Damages: $21,461.17; Front Pay: $0.00; Emotional Distress-Past: $120,000.00; Emotional Distress-Future: $27,683.21; Total: $190,605.55; 9. Clifford B. Meacham: Back Pay: $0.00; Liquidated Damages: $0.00; Emotional Distress-Past: $125,000.00; Emotional Distress-Future: $0.00; Total: $125,000.00; 10. Bruce E. Palmatier: Back Pay: $2,841.28; Liquidated Damages: $2,841.28; Front

Pay: $13,211.05; Emotional Distress-Past: $206,500.00; Emotional Distress-Future: $106,732.48; Total: $332,126.09; 11. Christine A. Palmer: Back Pay: $11,281.25; Liquidated Damages: $11,281.25; Emotional Distress-Past: $56,250.00; Emotional Distress-Future: $0.00; Total: $78,812.50; 12. Neil R. Pareene: Back Pay: $63,050.37; Liquidated Damages: $63,050.37; Front Pay: $0.00; Emotional Distress-Past: $130,000.00; Emotional Distress-Future: $27,683.21; Total: $283,783.95; 13. James R. Quinn: Back Pay: $12,460.52; Liquidated Damages: $12,460.52; Front Pay: $0.00; Emotional Distress-Past: $44,000.00; Emotional Distress-Future: $0.00; Total: $68,921.04; 14. William C. Reynheer: Back Pay: $179,740.17; Liquidated Damages: $179,740.17; Front Pay: $102,380.00; Emotional Distress-Past: $539,220.51; Emotional Distress-Future: $114,276.73; Total: $1,115,357.58; 15. John K.

Stannard: Back Pay: $58,242.97; Liquidated Damages: $58,242.97; Front Pay: $0.00; Emotional Distress-Past: $122,750.00; Emotional Distress-Future: $18,953.46; Total: $258,189.40; 16. Allen G. Sweet: Back Pay: $0.00; Liquidated Damages: $0.00; Front Pay: $0.00; Emotional Distress-Past: $110,000.00; Emotional Distress-Future: $18,953.46; Total: $128,953.46; 17. David W. Townsend: Back Pay: $18,126.82; Liquidated Damages: $18,126.82; Front Pay: $25,121.50; Emotional Distress-Past: $248,000.00; Emotional Distress-Future: $88,107.77; Total: $397,482.91; 18: Carl T. Woodman: Back Pay: $33,920.18; Liquidated Damages: $33,920.18; Front Pay: $42,344.21; Emotional Distress-Past: $182,168.95; Emotional Distress-Future: $139,755.36; Total: $432,108.88 , The plaintiffs listed below are granted judgment against defendant John J. Freeh on plaintiffs' disparate impact theory of age discrimination under New York Human

Rights Law, and the plaintiffs listed below are each awarded judgment for damages against defendant John J. Freeh, Jointly and severally, in the total amounts listed below for each plaintiff: 1. Raymond Adams: Back Pay: $20,911.26; Front Pay: $75,205.01; Emotional Distress-Past: $198,400.00; Emotional Distress-Future: $96,395.60; Total: $390,911.87; 2. Wallace Arnold: Back Pay: $172,899.95; Front Pay: $62,247.50; Emotional Distress-Past: $75,000.00; Emotional Distress-Future: $43,778.41; Total: $353,925.86; 3. Deborah L. Bush: Back Pay: $32,152.97; Front Pay: $70,625.15; Emotional Distress-Past: $67,800.00; Emotional Distress-Future: $43,778.41; Total: $214,356.53; 4. William R. Chabot: Back Pay: $0.00; Front Pay: $0.00; Emotional Distress-Past: $110,000.00; Emotional Distress-Future: $9,734.85; Total: $119,734.85; 5. Allen E. Cromer: Back Pay: $17,326.06; Front Pay: $0.00; Emotional Distress-Past:

$65,000.00; Emotional Distress-Future: $9,734.85; Total: $92,060.91; 6. Thedrick L. Eighmie: Back Pay: $25,585.00; Front Pay: $0.00; Emotional Distress-Past: $40,275.00; Emotional Distress-Future: $0.00; Total: $65,860.00; 7. Paul M. Gundersen: Back Pay: $14,820.15; Front Pay: $0.00; Emotional Distress-Past: $86,800.00; Emotional Distress-Future: $43,778.41; Total: $145,398.56; 8. Clifford J. Levendusky: Back Pay: $21,461.17; Front Pay: $0.00; Emotional Distress-Past: $120,000.00; Emotional Distress-Future: $27,683.21; Total: $169,144.38; 9. Clifford B. Meacham: Back Pay: $0.00; Emotional Distress-Past: $125,000.00; Emotional Distress-Future: $0.00; Total: $125,000.00; 10. Bruce E. Palmatier: Back Pay: $2,841.28; Front Pay: $13,211.05; Emotional Distress-Past: $206,500.00; Emotional Distress-Future: $106,732.48; Total: $329,284.81; 11. Christine A.

Palmer: Back Pay: $11,281.25; Emotional Distress-Past: $56,250.00; Emotional Distress-Future: $0.00; Total: $67,531.25; 12. Neil R. Pareene: Back Pay: $63,050.37; Front Pay: $0.00; Emotional Distress-Past: $130,000.00; Emotional Distress-Future: $27,683.21; Total: $220,733.58; 13. James R. Quinn: Back Pay: $12,460.52; Front Pay: $0.00; Emotional Distress-Past: $44,000.00; Emotional Distress-Future: $0.00; Total: $56,460.52; 14. William C. Reynheer: Back Pay: $179,740.17; Front Pay: $102,380.00; Emotional Distress-Past: $539,220.51; Emotional Distress-Future: $114,276.73; Total: $935,617.41; 15. John K. Stannard: Back Pay: $58,242.97; Front Pay: $0.00; Emotional Distress-Past: $122,750.00; Emotional Distress-Future: $18,953.46; Total: $199,946.43; 16. Allen G. Sweet: Back Pay: $0.00; Front Pay: $0.00; Emotional Distress-Past: $110,000.00; Emotional Distress-Past: $18,953.46;

		Total: $128,953.46; 17. David W. Townsend: Back Pay: $18,126.82; Front Pay: $25,121.50; Emotional Distress-Past: $248,000.00; Emotional Distress-Future: $88,107.77; Total: $379,356.09; 18: Carl T. Woodman: Back Pay: $33,920.18; Front Pay: $42,344.21; Emotional Distress-Past: $182,168.95; Emotional Distress-Future: $139,755.36; Total: $398,188.70 (signed by Magistrate Judge David R. Homer on 12/11/00) Date Entered: 12/11/00 (jel) (Entered: 12/11/2000)
12/19/2000	137	NOTICE OF MOTION by John E. Higgins, Esq., for Knolls Atomic Power, Lockheed Martin, John J. Freeh, James R. Quinn for Judgment as a Matter of Law, New Trial and/or Remittitur , Hearing set for 10:00 a.m. on 3/16/01, Response Deadline 3/1/01 Motion returnable before Judge/Mag. Judge: David R. Homer (jel) (Entered: 12/19/2000)
12/19/2000	137	SUPPORTING AFFIDAVIT along with Exhibits A-K by John E. Higgins, Esq., for

		Knolls Atomic Power, Lockheed Martin, John J. Freeh Re: in support of the [137-1] motion for Judgment as a Matter of Law, New Trial and/or Remittitur (jel) (Entered: 12/19/2000)
02/01/2001	196	POST-TRIAL MEMORANDUM OF LAW by John E. Higgins, Esq., for Knolls Atomic Power, Lockheed Martin, John J. Freeh in support of the [137-1] motion for Judgment as a Matter of Law, New Trial and/or Remittitur (jel) (Entered: 02/02/2001)
02/13/2002	212	MEMORANDUM-DECISION AND ORDER that Defendants' [137-1] motion for Judgment as a Matter of Law is DENIED, and New Trial and/or Remittitur is DENIED in all respects except as to the following: i. Defendants' moton for a new trial on the issue of damages for emotional distress awarded to plaintiffs Raymond E. Adams, Clifford J. Levendusky, Neil R. Pareene, William C. Reynheer, Allen G. Sweet and Carl T. Woodman is GRANTED unless such

plaintiffs file and serve written acceptances of remittiur of the emotional distress components of their damages awards to $125,000.00 each on or before 3/8/02; ii. Defendants' motion for a new trial on the issue of damages for emotional distress awarded to plaintiffs Bruce E. Palmatier and David W. Townsend is GRANTED unless such plaintiffs file and serve written acceptances of remittitur of the emotional distress components of their damages awards to $175,000 each on or before 3/8/02, Plaintiffs' [138-1] motion for A. Prejudgment interest is GRANTED as to plaintiffs' back pay awards and is DENIED in all other respects; B. Postjudgment interest is GRANTED; C. An upward adjustment of damages for increased taxes is DENIED; Plaintiffs' [197-1] motion for an award of attorneys' fees and costs incurred through 11/22/00 is GRANTED, and plaintiffs are awarded attorneys' fees in the amount of $873,868.09 and costs in the amount of

		$23,483.02. (signed by Magistrate Judge David R. Homer) (jel) (Entered: 02/14/2002)
03/28/2002	214	SECOND AMENDED JUDGMENT (Signed by Judge David R. Homer on 3/28/02); Date Served: 3/28/02 Date Entered: 3/28/02 (jel) (Entered: 03/28/2002)
04/03/2002	215	NOTICE OF APPEAL by Margaret A. Clemens, Esq., for Knolls Atomic Power, Lockheed Martin, John J. Freeh. Appellants are appealing from the second amended judgment entered on or about 3/28/02. FILING FEE $105.00 RECEIPT #62334 Appeal record due on 5/3/02 (jel) (Entered: 04/04/2002)
04/24/2002	219	NOTICE OF APPEAL by John B. Ducharme, Esq., for Clifford B. Meacham, Thedrick L. Eighmie, Allen G. Sweet, James R. Quinn, Deborah L. Bush, Raymond E. Adams, Wallace Arnold, William F. Chabot, Allen E. Cromer, Paul M. Gundersen, Clifford J. Levendusky, Bruce E. Palmatier, Neil R. Pareene,

		William Reynheer, John K. Stannard, David W. Townsend, Carl T. Woodman. FILING FEE $ 105.00 RECEIPT # 62403 Appeal record due on 5/24/02 (jel) (Entered: 04/25/2002)
05/14/2002	224	THIRD AMENDED JUDGMENT (signed by USMJ David R. Homer on 5/14/02) Date Served: 5/16/02 (jel) (Entered: 05/16/2002)
06/07/2002	225	NOTICE OF APPEAL by John E. Higgins, Esq., for Knolls Atomic Power, Lockheed Martin, John J. Freeh. Appellant is appealing from the Third Amended Judgment entered and filed on 5/14/02. FILING FEE $105.00 RECEIPT #64048 (jel) (Entered: 06/10/2002)
11/08/2004	290	MANDATE and Slip Opinion of USCA. It is ORDERED, ADJUDGED, and DECREED that the judgment of said District Court is hereby AFFIRMED in accordance with the opinion of this court. (ban) (Entered: 11/09/2004)
11/22/2004	291	Appeal Remark re 225 Notice of Appeal: An order has been

BEST AVAILABLE COPY

		entered by the Supreme Court recalling and staying the mandate reissuance of the mandate of this court in the above entitled case. Copy of Order attached. (ban) (Entered: 11/26/2004)
01/24/2007	293	MANDATE and Slip Opinion of USCA. (ban) (Entered: 01/26/2007)

APPENDIX B

U.S. Court of Appeals for the Second Circuit

Court of Appeals Docket #: 02-7378-cv

Nsuit : 3442 CIVIL RIGHTS-Jobs

Meacham v. Knolls Atomic Power Filed 4/8/02

Appeal from: NDNY (ALBANY)

Case type information:

Lower court information:

District:	97-cv-12
Trial Judge:	
MagJudge:	David R. Homer
Date Filed:	01/06/97
Date order/judgement:	3/28/2002
Date NOA filed:	4/3/2002

Fee status: Paid

Panel Assignment: JMcL DJ RSP

Date of decision:

Prior cases: NONE

Current cases NONE

EEOC **Nat`l Employment** *Amicus Curiae*	**Barbara L. Sloan Esq.** Equal Employment Opportunity Commission 1801 L St., NW Washington , DC , 20507 202-663-4721 **Cathy Ventrell-Monsees Esq.** Law office of Cathy Ventrell-Monsees 3208 Flushing Meadow Terrace Chevy Chase, MD, 20815 202-434-2277
Allen E. Cromer *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** Berger & DuCharme & Harp, LLP 10 Maxwell Dr. Clifton Park, NY, 12065 518-373-1482
Allen G. Sweet *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Arthur J. Kaszubski *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)

Bruce E. Palmatier *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Bruce E. Vedder *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Carl T. Woodman *Amicus Curiae*	**John B. DuCharme Esq.** (See above)
Christine A. Palmer *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Clifford B. Meacham *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Clifford J. Levendusky *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
David J. Kopmeyer *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
David W. Townsend *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Deborah L. Bush *Amicus Curiae*	**John B. DuCharme Esq.** (See above)

Frank A. Paxton *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Henry Bielawski *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Hildreth E. Simmons *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
James R. Quinn *Amicus Curiae*	**John B. DuCharme Esq.** (See above)
James S. Chambers *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Janice M. Polsinelle *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
John K. Stannard *Defendant-Appellant-Cross-Appellee*	**John B. DuCharme Esq.** (See above)
Neil R. Pareene *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)

Paul M. Gundersen *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Raymond E. Adams *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Ronald G. Butler *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Teofils F. Turlais *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
Thedrick L. Eighmie *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Wallace Arnold *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
William C. Reynheer *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)
William F. Chabot *Consolidated-Plaintiff-Appellee*	**John B. DuCharme Esq.** (See above)

John J. Freeh *Defendant-Appellant-Cross-Appellee*	**John E. Higgins Esq.** Blank Rome, LLP 30 S. Pearl St. Albany, NY, 12207 518-427-2650
Knolls Atomic Power *Defendant-Appellant-Cross-Appellee*	**John E. Higgins Esq.** (See above)
Lockheed Martin *Defendant-Appellant-Cross-Appellee*	**John E. Higgins Esq.** (See above)
AARP *Amicus Curiae*	**Laurie A. McCann Esq.** AARP Foundation Litigation 601 E. Street, NW Washington, DC, 20049 202-434-2060
AARP Foundation Litigation	*Laurie A. McCann Esq.* (See above)
John J. Freeh *Defendant-Appellant-Cross-Appellee*	**Margaret A. Clemens Esq.** Blank Rome, LLP Clinton Square Rochester, NY, 14603 585-263-1453

Knolls Atomic Power *Defendant-Appellant-Cross-Appellee*	**Margaret A. Clemens Esq.** (See above)
Lockheed Martin *Defendant-Appellant-Cross-Appellee*	**Margaret A. Clemens Esq.** (See above)
Chamber of Commerce *Amicus Curiae*	**Mark S. Dichter Esq.** Morgan Lewis & Bockius 1701 Market St. Philadelphia, PA, 19103 215-963-5291

4/8/02	Copy of district court second amended judgment dated 3/28/02 endorsed by Hon. David R. Homer, USMJ RECEIVED. [02-7378] [Entry date Apr 18 2002] [DT]
1/8/03	Appellant-Cross-Appellee Knolls Atomic Power in 02-7378, Appellant-Cross-Appellee Lockheed Martin in 02-7378, Appellant-Cross-Appellee John J. Freeh in 02-7378 brief FILED with proof of service. [Entry date Jan 14 2003] [DT]
1/8/03	Appellant-Cross-Appellee Knolls Atomic Power in 02-7378, Appellant-Cross-Appellee Lockheed Martin in 02-7378, Appellant-Cross-Appellee John J. Freeh in 02-7378 joint appendix filed w/pfs. Number of volumes: 5. [Entry date Jan 14 2003] [DT]

1/8/03 Appellant-Cross-Appellee Knolls Atomic Power in 02-7378, Appellant-Cross-Appellee Lockheed Martin in 02-7378, Appellant-Cross-Appellee John J. Freeh in 02-7378 exhibits filed with proof of service. Number of volumes: 1. [Entry date Jan 14 2003] [DT]

1/8/03 Appellants Exhibit Trial Transcripts filed. Volumes: 12. [Entry date Jan 14 2003] [DT]

1/17/03 Amicus Curiae Chamber of Commerce in 02-7378 brief filed with proof of service. [Entry date Jan 22 2003] [DT]

2/6/03 Appellee-Cross-Appellant Clifford B. Meacham in 02-7378, Appellee-Cross-Appellant Thedrick L. Eighmie in 02-7378, Appellee-Cross-Appellant Allen G. Sweet in 02-7378 Appellee-Cross-Appellant James R. Quinn in 02-7378, Appellee-Cross-Appellant Deborah L. Bush in 02-7378, Appellee Hildreth E. Simmons in 02-7378, Appellee-Cross-Appellant Raymond E. Adams in 02-7378, Appellee-Cross-Appellant Wallace Arnold in 02-7378, Appellee Henry Bielawski in 02-7378, Appellee Ronald G. Butler in 02-7378, Appellee-Cross-Appellant William F. Chabot in 02-7378, Appellee James S. Chambers in 02-7378, Appellee-Cross-Appellant Allen E. Cromer in 02-7378, Appellee-Cross-Appellant Paul M. Gundersen in 02-7378, Appellee Arthur J.

Kaszubski in 02-7378, Appellee David J. Kopmeyer in 02-7378, Appellee-Cross-Appellant Clifford J. Levendusky in 02-7378, Appellee-Cross-Appellant Bruce E. Palmatier in 02-7378, Appellee Christine A. Palmer in 02-7378, Appellee-Cross-Appellant Neil R. Pareene in 02-7378, Appellee Frank A. Paxton in 02-7378, Appellee Janice M. Polsinelle in 02-7378, Appellee-Cross-Appellant William C. Reynheer in 02-7378, Appellee-Cross-Appellant John K. Stannard in 02-7378, Appellee-Cross-Appellant David W. Townsend in 02-7378, Appellee Teofils F. Turlais in 02-7378, Appellee Bruce E. Vedder in 02-7378, Appellee-Cross-Appellant Carl T. Woodman in 02-7378 brief filed with proof of service. [Entry date Feb 20 2003] [DT]

2/14/03 Amicus Curiae Nat'l Employment in 02-7378 brief filed with proof of service. [Entry date Feb 20 2003] [DT]

2/18/03 Appellant-Cross-Appellee Knolls Atomic Power in 02-7378, Appellant-Cross-Appellee Lockheed Martin in 02-7378, Appellant-Cross-Appellee John J. Freeh in 02-7378 reply brief filed with proof of service. [Entry date Feb 20 2003] [DT]

2/21/03 Amicus Curiae AARP in 02-7378 brief filed with proof of service. [Entry date Feb 28 2003] [DT]

2/25/03 Amicus Curiae EEOC in 02-7378 brief filed with proof of service. [Entry date Mar 5 2003] [DT]

3/4/03 Appellee-Cross-Appellant Clifford B. Meacham in 02-7378, Appellee-Cross-Appellant Thedrick L. Eighmie in 02-7378, Appellee-Cross-Appellant Allen G. Sweet in 02-7378, Appellee-Cross-Appellant James R. Quinn in 02-7378, Appellee-Cross-Appellant Deborah L. Bush in 02-7378, Appellee Hildreth E. Simmons in 02-7378, Appellee-Cross-Appellant Raymond E. Adams in 02-7378, Appellee-Cross-Appellant Wallace Arnold in 02-7378, Appellee Henry Bielawski in 02-7378, Appellee Ronald G. Butler in 02-7378, Appellee-Cross-Appellant William F. Chabot in 02-7378, Appellee James S. Chambers in 02-7378, Appellee-Cross-Appellant Allen E. Cromer in 02-7378, Appellee-Cross-Appellant Paul M. Gundersen in 02-7378, Appellee Arthur J. Kaszubski in 02-7378, Appellee David J. Kopmeyer in 02-7378, Appellee-Cross-Appellant Clifford J. Levendusky in 02-7378, Appellee-Cross-Appellant Bruce E. Palmatier in 02-7378, Appellee Christine A. Palmer in 02-7378, Appellee-Cross-Appellant Neil R. Pareene in 02-7378, Appellee Frank A. Paxton in 02-7378, Appellee Janice M. Polsinelle in 02-7378, Appellee-Cross-Appellant William C. Reynheer in 02-7378, Appellee-Cross-Appellant John K. Stannard in

02-7378, Appellee-Cross-Appellant David W. Townsend in 02-7378, Appellee Teofils F. Turlais in 02-7378, Appellee Bruce E. Vedder in 02-7378, Appellee-Cross-Appellant Carl T. Woodman in 02-7378 reply brief filed with proof of service. [Entry date Mar 5 2003] [DT]

9/10/03 Case heard before MCLAUGHLIN, JACOBS, POOLER, C.JJ . (TAPE: CD Date: 9/10/03) [Entry date Sep 10 2003] [DT]

9/16/03 Appellant KAPL, Inc. post-argument letter filed. [Entry date Sep 17 2003] [DT]

11/20/03 Appellant-Cross-Appellee Knolls Atomic Power in 02-7378, Appellant-Cross-Appellee Lockheed Martin in 02-7378, Appellant-Cross-Appellee John J. Freeh in 02-7378 28(J) letter received. [Entry date Nov 20 2003] [DT]

4/12/04 Record on appeal after index filed. (10 boxes) [Entry date Apr 12 2004] [VM]

8/23/04 Judgment of the district court is AFFIRMED by published signed opinion filed. (RSP) [Entry date Aug 23 2004] [JC]

8/23/04 Judgment filed. [Entry date Aug 23 2004] [JC]

9/7/04 Appellant Cross-Appellee Knolls Atomic Power, Appellant-Cross-Appellee John Freeh,

Appellant-Cross-Appellee Lockheed Martin motion Petition for rehearing filed with proof of service. petition for rehearing en banc filed with proof of service. [Entry date Sep 8 2004] [JC]

9/17/04 Errata sheet re: filed. [Entry date Sep 22 2004] [JC]

10/15/04 Notice to counsel in re: Order filed 10/15/04 DENYING appellants petition for rehearing [Entry date Oct 15 2004] [JC]

10/15/04 Order FILED DENYING motion petition for rehearing en banc by Appellant-Cross-Appellee Knolls Atomic Power, Appellant-Cross-Appellee John Freeh, Appellant-Cross-Appellee Lockheed Martin, endorsed on motion dated 9/7/2004 [Entry date Oct 15 2004] [JC]

11/1/04 Judgment MANDATE ISSUED. CLOSED [Entry date Nov 1 2004] [JC]

11/12/04 Letter sent to district court recalling mandate as per request of the Supreme Court of the United States. [Entry date Nov 12 2004] [JC]

11/12/04 Mandate receipt returned from the district court. [Entry date Nov 15 2004] [JK]

11/16/04 Certified copy of the order, from the Supreme Court recalling the mandate, issued

to the district court. [Entry date Nov 16 2004] [JC]

11/22/04 Certified copy of Supreme Court order dated 11/10/04 RECIEVED [Entry date Nov 24 2004] [JC]

12/1/04 Acco received in records room from team. [Entry date Dec 1 2004] [EM]

1/26/05 Notice of filing petition for APPELLANT-CROSS-APPELLEE Knolls Atomic Power, Lockheed Martin, John Freeh, dated 1/14/05 filed. Supreme Court #: 04-955. [Entry date Jan 27 2005] [JC]

4/11/05 Writ of Certiorari GRANTED [Entry date Apr 12 2005] [JC]

5/10/05 Supreme Court opinion filed. [Entry date May 10 2005] [JC]

5/10/05 Supreme Court judgment filed. [Entry date May 10 2005] [JC]

5/25/05 Order filed stating:
"The Court is directing the parties and allowing amici to file opening briefs not exceeding twenty-five pages that address the impact of Smith v. City of Jackson, 125 S. Ct. 1536 (2005) on our now vacated judgment in favor of plaintiffs within twenty days of the date of the order. The briefs should address the following issues:

(1) Whether Smith impacts our ruling under the ADEA;
(2) Whether Smith impacts our ruling under New York law;
(3) Whether our New York law ruling independently disposed of KAPL's appeal. Should the parties or amici choose to file reply briefs, they may not exceed ten pages and must be filed within ten days of filing of the last of the opening briefs. FOR THE COURT, RBMacKechnie, Clerk of Court." [Entry date May 25 2005] [PC]

6/14/05 APPELLANT-CROSS-APPELLEE Knolls Atomic Power, Lockheed Martin, John Freeh, brief FILED with proof of service. [Entry date Jun 15 2005] [JC]

6/14/05 missing page for appellants brief from APPELLANT-CROSS-APPELLEE Knolls Atomic Power, Lockheed Martin, John Freeh, received. [Entry date Jun 15 2005] [JC]

6/14/05 APPELLEE Arthur Kaszubski, Bruce Vedder, Christine Palmer, David Kopmeyer, ET AL; APPELLEE-CROSS-APPELLANT Allen Cromer, Allen Sweet, Bruce Palmatier, ET AL , brief filed with proof of service. [Entry date Jun 22 2005] [JC]

6/15/05 AMICUS CURIAE EEOC, brief filed with proof of service. [Entry date Jun 16 2005] [JC]

6/15/05 AMICUS CURIAE AARP Foundation Litigation, brief filed with proof of service. [Entry date Jun 16 2005] [JC]

6/17/05 APPELLANT-CROSS-APPELLEE Knolls Atomic Power, Lockheed Martin, John Freeh, corrected brief filed with proof of service. [Entry date Jun 28 2005] [JC]

6/27/05 APPELLEE Arthur Kaszubski, Bruce Vedder, Christine Palmer, David Kopmeyer, ET AL; APPELLEE-CROSS-APPELLANT Allen Cromer, Allen Sweet, Bruce Palmatier, ET AL , reply brief filed with proof of service. [Entry date Jun 28 2005] [JC]

6/28/05 APPELLANT-CROSS-APPELLEE Knolls Atomic Power, Lockheed Martin, John Freeh, reply brief filed with proof of service. [Entry date Jun 30 2005] [JC]

6/28/05 Case submitted before MCLAUGHLIN, JACOBS, POOLER, C.JJ. [Entry date Aug 14 2006] [AV]

8/15/05 APPELLANT-CROSS-APPELLEE Knolls Atomic Power, Lockheed Martin, John Freeh, 28(J) letter received. [Entry date Aug 15 2005] [JC]

8/19/05 Letter received from John B. DuCharme, dated 8/15/05, in response to appellees 28(J) letter filed 8/15/05 [Entry date Aug 23 2005] [JC]

9/2/05 APPELLEE Arthur Kaszubski, Bruce Vedder, Christine Palmer, David Kopmeyer, ET AL; APPELLEE-CROSS-APPELLANT Allen Cromer, Allen Sweet, Bruce Palmatier, ET AL , 28(J) letter received. [Entry date Sep 7 2005] [JC]

9/6/05 Letter received from Margaret A. Clemens, dated 9/2/05 in response to the decision by the New York State Supreme Court. [Entry date Sep 7 2005] [JC]

9/12/05 Letter received by John B. DuCharme, dated 9/6/05, in response to Margaret Clemens letter dated 9/2/05 [Entry date Sep 13 2005] [JC]

12/21/05 APPELLANT-CROSS-APPELLEE Knolls Atomic Power, Lockheed Martin, John Freeh, 28(J) letter received. [Entry date Dec 22 2005] [JC]

2/23/06 APPELLEE Arthur Kaszubski, Bruce Vedder, Christine Palmer, David Kopmeyer, ET AL; APPELLEE-CROSS-APPELLANT Allen Cromer, Allen Sweet, Bruce Palmatier, ET AL , 28(J) letter received. [Entry date Feb 24 2006] [JC]

2/28/06 APPELLANT-CROSS-APPELLEE Knolls Atomic Power, Lockheed Martin, John Freeh, 28(J) letter received. [Entry date Feb 28 2006] [JC]

3/3/06	APPELLEE Arthur Kaszubski, Bruce Vedder, Christine Palmer, David Kopmeyer, ET AL; APPELLEE-CROSS-APPELLANT Allen Cromer, Allen Sweet, Bruce Palmatier, ET AL , 28(J) letter received. [Entry date Mar 6 2006] [JC]
3/8/06	Letter received from Margaret A. Clemens, dated 3/7/06, in response to appellees 28(j) letter filed 3/3/06 [Entry date Mar 9 2006] [JC]
3/14/06	APPELLEE Arthur Kaszubski, Bruce Vedder, Christine Palmer, David Kopmeyer, ET AL; APPELLEE-CROSS-APPELLANT Allen Cromer, Allen Sweet, Bruce Palmatier, ET AL , 28(J) letter received. [Entry date Mar 15 2006] [JC]
3/31/06	APPELLEE Arthur Kaszubski, Bruce Vedder, Christine Palmer, David Kopmeyer, ET AL; APPELLEE-CROSS-APPELLANT Allen Cromer, Allen Sweet, Bruce Palmatier, ET AL , 28(J) letter received. [Entry date Apr 3 2006] [JC]
4/20/06	Letter received from John B. DuCharme, dated 4/20/06, in re: copies of letter filed previously in this appeal [Entry date Apr 21 2006] [JC]
8/14/06	Judgment of the district court is VACATED & REMANDED by published signed opinion filed.

(DJ) [Entry date Aug 18 2006] [JC]

8/14/06 Judgment filed. [Entry date Aug 14 2006] [JC]

8/14/06 Notice to counsel in re: Judgment filed 8/10/06 [Entry date Aug 14 2006] [JC]

8/14/06 Judge Pooler dissents in a separate opinion, filed. [Entry date Aug 14 2006] [JC]

8/21/06 Appellee-Cross-Appellant Clifford Meacham, Appellee-Cross-Appellant Thedrick Eighmie, Appellee-Cross-Appellant Allen Sweet, et al motion extended time to file petition for rehearing filed with proof of service. [Entry date Aug 22 2006] [JC]

8/25/06 Order FILED GRANTING motion extended time by Appellee-Cross-Appellant Clifford Meacham, Appellee-Cross-Appellant Thedrick Eighmie, Appellee-Cross-Appellant Allen Sweet, Appellee-Cross-Appellant James Quinn, Appellee-Cross-Appellant Deborah Bush, Appellee Hildreth Simmons, Appellee-Cross-Appellant Raymond Adams, Appellee-Cross-Appellant Wallace Arnold, Appellee Henry Bielawski, Appellee Ronald Butler, Appellee-Cross-Appellant William Chabot, Appellee James Chambers, Appellee-Cross-Appellant Allen Cromer, Appellee-Cross-Appellant Paul Gundersen, Appellee Arthur Kaszubski, Appellee David Kopmeyer, Appellee-Cross-Appellant Clifford

Levendusky, Appellee-Cross-Appellant Bruce Palmatier, Appellee Christine Palmer, Appellee-Cross-Appellant Neil Pareene, Appellee Frank Paxton, Appellee Janice Polsinelle, Appellee-Cross-Appellant William Reynheer, Appellant-Cross-Appellee John Stannard, Appellee-Cross-Appellant David Townsend, Appellee Teofils Turlais, Appellee Bruce Vedder, Appellee-Cross-Appellant Carl Woodman, endorsed on motion dated 8/21/2006. IT IS HEREBY ORDERED that the motion for 21-day extension of time to file a petition for rehearing en banc until September 18, 2006 is GRANTED. [Entry date Aug 28 2006] [JC]

9/18/06 AMICUS CURIAE AARP, AARP Foundation Litigation, brief filed with proof of service. [Entry date Sep 22 2006] [JC]

9/18/06 Amicus Curiae AARP Foundation Litigation, Amicus Curiae AARP motion file brief as amicus curiae filed with proof of service. [Entry date Sep 19 2006] [JC]

9/18/06 Appellee-Cross-Appellant Clifford Meacham, Appellee-Cross-Appellant Thedrick Eighmie, Appellee-Cross-Appellant Allen Sweet, et al Petition for rehearing filed with proof of service. petition for rehearing en banc filed with proof of service. [Entry date Sep 19 2006] [JC]

9/21/06 Appellants-cross-appellees response in opposition to petition for rehearing en banc filed with proof of service. [Entry date Sep 22 2006] [JC]

9/21/06 Order FILED GRANTING motion file brief as amicus curiae by Amicus Curiae AARP Foundation Litigation, Amicus Curiae AARP, endorsed on motion dated 9/18/2006. Before: Hon. JmcL, Hon. DJ, Hon. RSP. Endorsed by TWY [Entry date Sep 22 2006] [JC]

9/26/06 Errata sheet re: filed.. [Entry date Sep 27 2006] [JC]

1/8/07 Order FILED DENYING motion petition for rehearing en banc by Appellee-Cross-Appellant Clifford Meacham, Appellee-Cross-Appellant Thedrick Eighmie, Appellee-Cross-Appellant Allen Sweet, Appellee-Cross-Appellant James Quinn, Appellee-Cross-Appellant Deborah Bush, Appellee Hildreth Simmons, Appellee-Cross-Appellant Raymond Adams, Appellee-Cross-Appellant Wallace Arnold, Appellee Henry Bielawski, Appellee Ronald Butler, Appellee-Cross-Appellant William Chabot, Appellee James Chambers, Appellee-Cross-Appellant Allen Cromer, Appellee-Cross-Appellant Paul Gundersen, Appellee Arthur Kaszubski, Appellee David Kopmeyer, Appellee-Cross-Appellant Clifford Levendusky, Appellee-Cross-Appellant Bruce

Palmatier, Appellee Christine Palmer, Appellee-Cross-Appellant Neil Pareene, Appellee Frank Paxton, Appellee Janice Polsinelle, Appellee-Cross-Appellant William Reynheer, Appellant-Cross-Appellee John Stannard, Appellee-Cross-Appellant David Townsend, Appellee Teofils Turlais, Appellee Bruce Vedder, Appellee-Cross-Appellant Carl Woodman, endorsed on motion dated 9/18/2006 [Entry date Jan 9 2007] [JC]

1/18/07 Judgment MANDATE ISSUED. CLOSED [Entry date Jan 18 2007] [JC]

1/22/07 Acco received in records room from team. duplicate [Entry date Jan 22 2007] [NS]

2/1/07 Mandate receipt returned from the district court. [Entry date Feb 1 2007] [DR]

5/18/07 Notice of filing petition for APPELLANT-CROSS-APPELLEE John Stannard APPELLEE Arthur Kaszubski, Bruce Vedder, Christine Palmer, ET AL; APPELLEE-CROSS-APPELLANT Allen Cromer, Allen Sweet, Bruce Palmatier, ET AL , dated 5/15/07 filed. Supreme Court #: 06-1505. [Entry date May 21 2007] [JC]

1/28/08 Letter dated mm/dd/yy from the Supreme Court advising of order GRANTING petition for writ of certiorari by FILERS , filed. (Supreme Court # 06-1505) [Entry date Feb

11 2008] [KR]

1/28/08 Writ of Certiorari GRANTED. [Entry date Feb 11 2008] [KR]

1/28/08 Notice of Reinstatement due to the granting of the Supreme Court Writ of Certiorari received in this court 1/28/08, FILED. Reinstatement Code: M [Entry date Feb 25 2008] [KR]

2/5/08 Letter received from Supreme Court of the United States requesting USCA to transmit the entire record to their office. [Entry date Feb 6 2008] [AM]

2/25/08 Letter sent to district court recalling mandate due to the granting of the Supreme Court Writ of Certiorari received in this court 1/28/08. [Entry date Feb 25 2008] [KR]

2/25/08 Acco transmitted to the Supreme Court. [Entry date Feb 25 2008] [KR]

APPENDIX C

U.S. Court of Appeals for the Second Circuit

Court of Appeals Docket #: 02-7474-cv

Nsuit : 3442 CIVIL RIGHTS-Jobs

Meacham v. Knolls Atomic Power Filed 4/30/02

Appeal from: NDNY (ALBANY)

Case type information:

Lower court information:

District:	97-cv-12
Trial Judge:	
MagJudge:	David R. Homer
Date Filed:	01/06/97
Date order/judgement:	3/28/2002
Date NOA filed:	4/3/2002

Fee status: Paid

Panel Assignment: JMcL DJ RSP

Date of decision:

Prior cases: NONE

Current cases NONE

Allen E. Cromer *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** Berger & DuCharme & Harp, LLP 1023 Rt. 146 Clifton Park , NY , 12065 518-373-1482
Allen G. Sweet *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Bruce E. Palmatier *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Carl T. Woodman *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Clifford B. Meacham *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Clifford J. Levendusky *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
David W. Townsend *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)

Deborah L. Bush *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
James R. Quinn *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
John K. Stannard *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Neil R. Pareene *Defendant-Appellant-Cross-Appellee*	**John B. DuCharme Esq.** (See above)
Paul M. Gundersen *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Raymond E. Adams	**John B. DuCharme Esq.** (See above)
Thedrick L. Eighmie *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
Wallace Arnold *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)

William C. Reynheer *Plaintiff-Appellee-Cross*	**John B. DuCharme Esq.** (See above)
William F. Chabot *Defendant-Appellant-Cross-Appellee*	**John B. DuCharme Esq.** (See above)
John J. Freeh *Defendant-Appellant-Cross-Appellee*	**John E. Higgins Esq.** Blank Rome, LLP 30 S. Pearl St. Albany , NY , 12207 518-427-2650
Knolls Atomic Power *Defendant-Appellant-Cross-Appellee*	**John E. Higgins Esq.** (See above)
Lockheed Martin *Defendant-Appellant-Cross-Appellee*	**John E. Higgins Esq.** (See above)

4/30/02 Copy of notice of appeal and district court docket entries on behalf of Appellee-Cross-Appellant Clifford B. Meacham in 02-7474, Appellee-Cross-Appellant Thedrick L. Eighmie in 02-7474, Appellee-Cross-Appellant Allen G. Sweet in 02-7474, Appellee-Cross-Appellant James R. Quinn in 02-7474, Appellee-Cross-Appellant Deborah L. Bush in 02-7474, Appellee-Cross-Appellant Raymond E. Adams in

02-7474, Appellee-Cross-Appellant Wallace Arnold in 02-7474, Appellee-Cross-Appellant William F. Chabot in 02-7474, Appellee-Cross-Appellant Allen E. Cromer in 02-7474, Appellee-Cross-Appellant Paul M. Gundersen in 02-7474, Appellee-Cross-Appellant Clifford J. Levendusky in 02-7474, Appellee-Cross-Appellant Bruce E. Palmatier in 02-7474, Appellee-Cross-Appellant Neil R. Pareene in 02-7474, Appellee-Cross-Appellant William C. Reynheer in 02-7474, Appellee-Cross-Appellant John K. Stannard in 02-7474, Appellee-Cross-Appellant David W. Townsend in 02-7474, Appellee-Cross-Appellant Carl T. Woodman in 02-7474 filed. [02-7474] Form C due on 5/6/02. Form D due on 5/6/02. Fee paid, $105. 00. Receipt No. 62403. [Entry date May 6 2002] [DT]

4/30/02 FOR A LIST OF COMPLETE DOCKET ENTRIES PLEASE SEE THE LEAD APPEAL, DOCKET NUMBER: 02-7378. [Entry date May 6 2002] [DT]

5/3/02 Appellee-Cross-Appellant Clifford B. Meacham in 02-7474, Appellee-Cross-Appellant Thedrick L. Eighmie in 02-7474, Appellee-Cross-Appellant Allen G. Sweet in 02-7474, Appellee-Cross-Appellant James R. Quinn in 02-7474, Appellee-Cross-Appellant Deborah L. Bush in 02-7474, Appellee-Cross-Appellant Raymond E. Adams in

02-7474, Appellee-Cross-Appellant Wallace Arnold in 02-7474, Appellee-Cross-Appellant William F. Chabot in 02-7474, Appellee-Cross-Appellant Allen E. Cromer in 02-7474, Appellee-Cross-Appellant Paul M. Gundersen in 02-7474, Appellee-Cross-Appellant Clifford J. Levendusky in 02-7474, Appellee-Cross-Appellant Bruce E. Palmatier in 02-7474, Appellee-Cross-Appellant Neil R. Pareene in 02-7474, Appellee-Cross-Appellant William C. Reynheer in 02-7474, Appellee-Cross-Appellant John K. Stannard in 02-7474, Appellee-Cross-Appellant David W. Townsend in 02-7474, Appellee-Cross-Appellant Carl T. Woodman in 02-7474, Appellant-Cross-Appellee Knolls Atomic Power in 02-7474, Appellant-Cross-Appellee Lockheed Martin in 02-7474, Appellant-Cross-Appellee John J. Freeh in 02-7474 Form C filed, with proof of service. [02-7474] Form C deadline satisfied. [Entry date May 8 2002] [DT]

5/3/02 Appellee-Cross-Appellant Clifford B. Meacham in 02-7474, Appellee-Cross-Appellant Thedrick L. Eighmic in 02-7474, Appellee-Cross-Appellant Allen G. Sweet in 02-7474, Appellee-Cross-Appellant James R. Quinn in 02-7474, Appellee-Cross-Appellant Deborah L. Bush in 02-7474, Appellee-Cross-Appellant Raymond E. Adams in 02-7474, Appellee-Cross-Appellant Wallace Arnold in 02-7474, Appellee-Cross-Appellant

William F. Chabot in 02-7474, Appellee-Cross-Appellant Allen E. Cromer in 02-7474, Appellee-Cross-Appellant Paul M. Gundersen in 02-7474, Appellee-Cross-Appellant Clifford J. Levendusky in 02-7474, Appellee-Cross-Appellant Bruce E. Palmatier in 02-7474, Appellee-Cross-Appellant Neil R. Pareene in 02-7474, Appellee-Cross-Appellant William C. Reynheer in 02-7474, Appellee-Cross-Appellant John K. Stannard in 02-7474, Appellee-Cross-Appellant David W. Townsend in 02-7474, Appellee-Cross-Appellant Carl T. Woodman in 02-7474, Appellant-Cross-Appellee Knolls Atomic Power in 02-7474, Appellant-Cross-Appellee Lockheed Martin in 02-7474, Appellant-Cross-Appellee John J. Freeh in 02-7474 Form D filed, with proof of service. [02-7474] Form D deadline satisfied. [Entry date May 8 2002] [DT]

9/10/03 Case heard before MCLAUGHLIN, JACOBS, POOL
C.JJ . (TAPE: CD Date: 9/10/03)
[Entry date Sep 10 2003] [DT]

8/23/04 Judgment of the district court is AFFIRMED by published signed opinion filed. (RSP)
[Entry date Aug 23 2004] [JC]

8/23/04 Judgment filed. [Entry date Aug 23 2004] [JC]

11/1/04 Judgment MANDATE ISSUED. CLOSED

[Entry date Nov 1 2004] [JC]

6/28/05 Case submitted before. MCLAUGHLIN, JACOBS, POOLER, C.JJ. [Entry date Sep 11 2006] [AV]

8/14/06 Judgment of the district court is VACATED & REMANDED by published signed opinion filed. (DJ) [Entry date Aug 18 2006] [JC]

8/14/06 Judgment filed. [Entry date Aug 18 2006] [JC]

1/18/07 Judgment MANDATE ISSUED. CLOSED [Entry date Jan 18 2007] [JC]

APPENDIX D

97-CV-12
Special Verdict Form
Meacham v. Knolls

Disparate Treatment
Mixed Motives

1. As to each plaintiff, do you find that the plaintiffs have proven that in selecting the plaintiffs for termination of their employment in the reduction-in-force, the defendant you are considering was motivated by the age of the plaintiff?

[answer on next page]

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
Clifford B. Meacham		X		X		X
Thedrick L. Eighmie		X		X		X
Allen G. Sweet		X		X		X
James R. Quinn		X		X		X
Deborah L. Bush		X		X		X
Hildreth E. Simmons, Jr.		X		X		X

BEST AVAILABLE COPY

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
Raymond E. Adams		X		X		X
Wallace Arnold		X		X		X
Henry Bielawski		X		X		X
Ronald G. Butler, Sr.		X		X		X
William R. Chabot		X		X		X
James S. Chambers		X		X		X
Allen E. Cromer		X		X		X
Paul M. Gundersen		X		X		X
Arthur J. Kaszubski		X		X		X
David J. Kopmeyer		X		X		X
Clifford J. Levendusky		X		X		X
Bruce E. Palmatier		X		X		X
Christine A. Palmer		X		X		X
Neil R. Pareene		X		X		X
Frank A. Paxton		X		X		X

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
Janice M. Polsinelle		X		X		X
William C. Reynheer		X		X		X
John K. Stannard		X		X		X
David W. Townsend		X		X		X
Teofils F. Turiais		X		X		X
Bruce E. Vedder		X		X		X
Carl T. Woodman		X		X		X

If you answered "No" to question 1 as to all plaintiffs for all defendants, proceed to question 4. If you answered "Yes" to question 1 as to any plaintiff and any defendant, proceed to question 2 as to any plaintiff(s) and defendant(s) for whom you answered "Yes" in question 1.

2. As to any plaintiff for whom you answered "Yes" in question 1, do you find that a defendant for whom you answered "Yes" in question 1 has proven that the plaintiff would still have been selected for termination of his or her employment in the reduction-in-force even without considering the age of that plaintiff?

[answer on next page]

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
Clifford B. Meacham						
Thedrick L. Eighmie						
Allen G. Sweet						
James R. Quinn						
Deborah L. Bush						
Hildreth E. Simmons, Jr.						
Raymond E. Adams						
Wallace Arnold						
Henry Bielawski						

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
Ronald G. Butler, Sr.						
William R. Chabot						
James S. Chambers						
Allen E. Cromer						
Paul M. Gundersen						
Arthur J. Kaszubski						
David J. Kopmeyer						
Clifford J. Levendusky						
Bruce E. Palmatier						
Christine A. Palmer						
Neil R. Pareene						
Frank A. Paxton						
Janice M. Polsinelle						
William C. Reynheer						
John K. Stannard						

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
David W. Townsend						
Teofils F. Turiais						
Bruce E. Vedder						
Carl T. Woodman						

If you answered "No" for Knolls Atomic, Lockheed Martin, or both as to any plaintiff in question 2, you must answer the following question:

3. Do you find that the plaintiffs have proven that in discriminating on the basis of age, such defendant acted willfully as to any plaintiff for whom you answered "No" in question 2?

[answer on next page]

	Knolls Atomic		Lockheed Martin	
Plaintiff	Yes	No	Yes	No
Clifford B. Meacham				
Thedrick L. Eighmie				
Allen G. Sweet				
James R. Quinn				
Deborah L. Bush				

	Knolls Atomic		Lockheed Martin	
Plaintiff	Yes	No	Yes	No
Hildreth E. Simmons, Jr.				
Raymond E. Adams				
Wallace Arnold				
Henry Bielawski				
Ronald G. Butler, Sr.				
William R. Chabot				
James S. Chambers				
Allen E. Cromer				
Paul M. Gundersen				
Arthur J. Kaszubski				
David J. Kopmeyer				
Clifford J. Levendusky				
Bruce E. Palmatier				
Christine A. Palmer				
Neil R. Pareene				
Frank A. Paxton				
Janice M. Polsinelle				
William C. Reynheer				
John K. Stannard				
David W. Townsend				
Teofils F. Turiais				
Bruce E. Vedder				
Carl T. Woodman				

Pretext

4. As to each plaintiff, do you find that the plaintiffs have proven that the selection of the plaintiff for termination of his or her employment in the reduction-in-force was motivated by the age of that plaintiff?

[answer on the next page]

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
Clifford B. Meacham		X		X		X
Thedrick L. Eighmie		X		X		X
Allen G. Sweet		X		X		X
James R. Quinn		X		X		X
Deborah L. Bush		X		X		X
Hildreth E. Simmons, Jr.		X		X		X
Raymond E. Adams		X		X		X
Wallace Arnold		X		X		X
Henry Bielawski		X		X		X
Ronald G. Butler, Sr.		X		X		X

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
William R. Chabot		X		X		X
James S. Chambers		X		X		X
Allen E. Cromer		X		X		X
Paul M. Gundersen		X		X		X
Arthur J. Kaszubski		X		X		X
David J. Kopmeyer		X		X		X
Clifford J. Levendusky		X		X		X
Bruce E. Palmatier		X		X		X
Christine A. Palmer		X		X		X
Neil R. Pareene		X		X		X
Frank A. Paxton		X		X		X
Janice M. Polsinelle		X		X		X
William C. Reynheer		X		X		X
John K. Stannard		X		X		X
David W. Townsend		X		X		X

	Knolls Atomic		Lockheed Martin		John J. Freeh	
Plaintiff	Yes	No	Yes	No	Yes	No
Teofils F. Turiais		X		X		X
Bruce E. Vedder		X		X		X
Carl T. Woodman		X		X		X

If you answered "Yes" for Knolls Atomic, Lockheed Martin, or both as to any plaintiff in question 4, you must answer the following question:

5. Do you find that the plaintiffs have proven that in discriminating on the basis of age, such defendant acted willfully as to any plaintiff for whom you answered "Yes" in question 4?

[answer on next page]

	Knolls Atomic		Lockheed Martin	
Plaintiff	Yes	No	Yes	No
Clifford B. Meacham				
Thedrick L. Eighmie				
Allen G. Sweet				
James R. Quinn				
Deborah L. Bush				
Hildreth E. Simmons, Jr.				
Raymond E. Adams				

	Knolls Atomic		Lockheed Martin	
Plaintiff	Yes	No	Yes	No
Wallace Arnold				
Henry Bielawski				
Ronald G. Butler, Sr.				
William R. Chabot				
James S. Chambers				
Allen E. Cromer				
Paul M. Gundersen				
Arthur J. Kaszubski				
David J. Kopmeyer				
Clifford J. Levendusky				
Bruce E. Palmatier				
Christine A. Palmer				
Neil R. Pareene				
Frank A. Paxton				
Janice M. Polsinelle				
William C. Reynheer				
John K. Stannard				
David W. Townsend				
Teofils F. Turiais				
Bruce E. Vedder				
Carl T. Woodman				

Disparate Impact

6. As to the twenty-six plaintiffs who were employed in exempt positions, do you find that the plaintiffs have proven that a specific employment practice of the defendants listed below, although non-discriminatory on its face, had an adverse impact on the plaintiffs because of their age?

Knolls Atomic Power Laboratory, Inc.	X YES __NO
Lockheed Martin, Inc.	X YES __NO
John J. Freeh	X YES __NO

If you answered "No" to question 6 as to all defendants, proceed no further and your verdict is complete. If you answered "Yes" to question 6 as to any defendant, proceed to question 7 as to any defendant for whom you answered "Yes" in question 6.

7. As to the twenty-six plaintiffs who were employed in exempt positions, do you find that any defendant for whom you answered "Yes" in question 6 has articulated a business justification for selecting the plaintiffs for termination of their employment in the reduction-in-force?

Knolls Atomic Power Laboratory, Inc.	__YES X NO
Lockheed Martin, Inc.	__YES X NO
John J. Freeh	__YES X NO

Proceed to question 9 for defendant Knolls Atomic, Lockheed Martin, or both if answered [sic] "No" as to them in question 7. If you

answered "Yes" to question 7 as to any defendant, proceed to question 8 as to any defendant for whom you answered "Yes" in question 7.

8. As to the twenty-six plaintiffs who were employed in exempt positions, do you find that the plaintiffs have proven that an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals as the method actually followed by the defendants?

Knolls Atomic Power Laboratory, Inc.	X YES	NO
Lockheed Martin, Inc.	X YES	NO
John J. Freeh	X YES	NO

If you answered "No" to question 8 as to all defendants, proceed no further and your verdict is complete. If you answered "Yes" to question 8 as to defendants Knolls Atomic, Lockheed Martin, or both, proceed to question 9 as to either defendant for whom you answered "Yes" in question 8.

9. Do you find that the plaintiffs have proven that in discriminating on the basis of age, the defendant acted willfully?

Knolls Atomic Power Laboratory, Inc.	X YES	NO
Lockheed Martin, Inc.	X YES	NO

Date: 7/26/00
Time: 12:56 P.M.

/s/
Jury Foreperson

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

CLIFFORD B. MEACHAM, THEDRICK L. EIGHME, and ALLEN G. SWEET, all individually, and on behalf of all other persons similarly situated, and

JAMES R. QUINN, PhD.; DEBORAH L. BUSH; HILDRETH E. SIMMONS, JR.; RAYMOND E. ADAMS; WALLACE ARNOLD; HENRY BIELAWSKI; RONALD G. BUTLER, SR.; WILLIAM F. CHABOT; HAMES S. CHAMBERS; ALLEN E. CROMER; PAUL M. GUNDERSEN; ARTHUR J. KASZUBSKI; DAVID J. KOPMEYER; CLIFFORD J. LEVENDUSKY; BRUCE E. PALMATIER; CHRISTINE A. PALMER; NEIL R. PAREENE; FRANK A. PAXTON; JANICE M. POLSINELLE; WILLIAM C. REYNHEER; JOHN K. STANNARD; DAVID W. TOWNSEND; TEOFILS F. TURLAIS; BRUCE E. VEDDER; and CARL T. WOODMAN,

Plaintiffs,

THIRD AMENDED JUDGMENT

Civil Action No.: 97-CV-0012 (DRH) (Lead Case)

v.

KAPL, INC.; and LOCKHEED MARTIN CORPORATION; and JOHN J. FREEH, both individually, and as an employee of KAPL, and Lockheed Martin,

Defendants.

JAMES R. QUINN, PhD.,

Plaintiff,

v.

KAPL, INC.; and LOCKHEED MARTIN CORPORATION; and JOHN J. FREEH, both individually, and as an employee of KAPL, and Lockheed Martin

Defendants.

No. 97-CV-45 (DRH) (Member Case)

DAVID R. HOMER
U.S. MAGISTRATE JUDGE

THIRD AMENDED JUDGMENT

The trial of the above captioned consolidated actions before a jury concluded on November 22, 2000, with the return of the final verdict. Based on the verdicts a judgment was filed on December 5, 2000, and an amended judgment was filed on December 11, 2000. Subsequently, post-trial motions were filed and decided on February 13, 2002 and May 3, 2002. Based on the verdicts, judgments and the subsequent post-trial motions, it is hereby

ORDERED that;

1. All defendants are granted judgment on all claims as to plaintiffs Ronald Butler Sr., and Janice Polsinelle;

2. All defendants are granted judgment as to all plaintiffs on plaintiffs' disparate treatment theory of age discrimination under the Age Discrimination in Employment Act and the New York Human Rights Law; and

3. The plaintiffs listed below are granted judgment against defendants KAPL, Inc., and Lockheed Martin Corporation on plaintiffs' disparate impact theory of age discrimination under the Age Discrimination in Employment Act and the New York Human Rights Law, and on plaintiffs' claims for liquidated damages based on the finding that KAPL, Inc., and Lockheed Martin Corporation each acted willfully; and the plaintiffs listed below are each awarded judgment for damages against defendants KAPL, Inc., and Lockheed Martin Corporation, jointly and severely [sic], in the total amounts listed below for each plaintiff:

Judgment Plaintiff	**Amount of Judgment**[1]	
Raymond Adams	Back Pay:	$20,911.26

[1] All amounts awarded by the jury for front pay and emotional distress have been reduced to the present values incorporated herein by stipulation of the parties. All amounts of prejudgment interest are calculated on the back pay award through 12/5/00. All amounts of post-judgment interest are calculated on the total award for the period between 12/06/00 and 03/28/02 (the date of the Second Amended Judgment) at the rate of 6.052%, compounded annually.

Judgment Plaintiff	Amount of Judgment[1]	
	Liquidated Damages:	$20,911.26
	Front Pay:	$75.205.91
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$3,656.33
	Post Judgment Interest:	$19,730.70
	TOTAL:	**$265,414.56**
Wallace Arnold	Back Pay:	$172,899.95
	Liquidated Damages:	$172,899.95
	Front Pay:	$62,247.50
	Emotional Distress:	$118,778.41
	Prejudgment Interest:	$30,231.63
	Post Judgment Interest:	$44,736.90
	TOTAL:	**$601,794.34**
Deborah L. Bush	Back Pay:	$32,152.97
	Liquidated Damages:	$32,152.97
	Front Pay:	$70,625.15
	Emotional Distress:	$111,578.41
	Prejudgment Interest:	$5,621.96

Judgment Plaintiff	Amount of Judgment[1]	
	Post Judgment Interest:	$20,248.51
	TOTAL:	**$272,379.97**
William F. Chabot	Back Pay:	$0.00
	Liquidated Damages:	$0.00
	Front Pay:	$0.00
	Emotional Distress:	$119,734.85
	Prejudgment Interest:	$0.00
	Post Judgment Interest:	$9,615.82
	TOTAL:	**$129,350.67**
Allen E. Cromer	Back Pay:	$17,326.06
	Liquidated Damages:	$17,326.06
	Front Pay:	$0.00
	Emotional Distress:	$74,734.85
	Prejudgment Interest:	$3,029.47
	Post Judgment Interest:	$9,028.08
	TOTAL:	**$121,444.52**
Thedrick L. Eighmie	Back Pay:	$25,585.00
	Liquidated	$25,585.00

Judgment Plaintiff	**Amount of Judgment**[1]	
	Damages:	
	Front Pay:	$0.00
	Emotional Distress:	$40,275.00
	Prejudgment Interest:	$4,473.54
	Post Judgment Interest:	$7,703.15
	TOTAL:	**$103,621.69**
Paul M. Gundersen	Back Pay:	$14,820.15
	Liquidated Damages:	$14,820.15
	Front Pay:	$0.00
	Emotional Distress:	$130,578.41
	Prejudgment Interest:	$2,591.31
	Post Judgment Interest:	$13,075.16
	TOTAL:	**$175,885.18**
Clifford J. Levendusky	Back Pay:	$21,461.17
	Liquidated Damages:	$21,461.17
	Front Pay:	$0.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$3,752.49

Judgment Plaintiff	**Amount of Judgment**[1]	
	Post Judgment Interest:	$13,787.09
	TOTAL:	**$185,461.92**
Clifford B. Meacham	Back Pay:	$0.00
	Liquidated Damages:	$0.00
	Front Pay:	$0.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$0.00
	Post Judgment Interest:	$10,038.66
	TOTAL:	**$135,038.66**
Bruce E. Palmatier	Back Pay:	$2,841.28
	Liquidated Damages:	$2,841.28
	Front Pay:	$13,211.05
	Emotional Distress:	$175,000
	Prejudgment Interest:	$496.81
	Post Judgment Interest:	$15,611.36
	TOTAL:	**$210,001.78**
Neil R. Pareene	Back Pay:	$63,050.37
	Liquidated	$63,050.37

Judgment Plaintiff	**Amount of Judgment**[1]	
	Damages:	
	Front Pay:	$0.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$11,024.39
	Post Judgment Interest:	$21,051.08
	TOTAL:	**$283,176.21**
James R. Quinn	Back Pay:	$12,460.52
	Liquidated Damages:	$12,460.52
	Front Pay:	$0.00
	Emotional Distress:	$44,000.00
	Prejudgment Interest:	$2,178.73
	Post Judgment Interest:	$5,709.97
	TOTAL:	**$76,809.74**
William C. Reynheer	Back Pay:	$179,740.17
	Liquidated Damages:	$179,740.17
	Front Pay:	$102,380.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$31,427.66
	Post Judgment	$49,654.28

Judgment Plaintiff	**Amount of Judgment**[1]	
	Interest:	
	TOTAL:	**$667,942.28**
John K. Stannard	Back Pay:	$58,242.97
	Liquidated Damages:	$58,242.97
	Front Pay:	$0.00
	Emotional Distress:	$141,703.46
	Prejudgment Interest:	$10,183.81
	Post Judgment Interest:	$21,552.87
	TOTAL:	**$289,926.08**
Allen G. Sweet	Back Pay:	$0.00
	Liquidated Damages:	$0.00
	Front Pay:	$0.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$0.00
	Post Judgment Interest:	$10,038.66
	TOTAL:	**$135,038.66**
David W. Townsend	Back Pay:	$18,126.82
	Liquidated Damages:	$18,126.82

Judgment Plaintiff	**Amount of Judgment**[1]	
	Front Pay:	$25,121.50
	Emotional Distress:	$175,000.00
	Prejudgment Interest:	$3,169.48
	Post Judgment Interest:	$19,237.66
	TOTAL:	**$258,782.28**
Carl T. Woodman	Back Pay:	$33,920.18
	Liquidated Damages:	$33,920.18
	Front Pay:	$42,344.21
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$5,930.96
	Post Judgment Interest:	$19,363.82
	TOTAL:	**$260,479.35**

4. The plaintiffs listed below are granted judgment against John J. Freeh on plaintiffs' disparate impact theory of age discrimination under the New York Human Rights Law, and the plaintiffs listed below are each awarded judgment for damages against defendant John J. Freeh, jointly and severally, in the total amounts listed below for each plaintiff:

Judgment Plaintiff	**Amount of Judgment**[2]	
Raymond Adams	Back Pay:	$20,911.26
	Front Pay:	$75,205.01
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$3,656.33
	Post Judgment Interest:	$19,730.70
	TOTAL:	**$244,503.30**
Wallace Arnold	Back Pay:	$172,899.95
	Front Pay:	$62,247.50
	Emotional Distress:	$118,778.41
	Prejudgment Interest:	$30,231.63
	Post Judgment Interest:	$44,736.90
	TOTAL:	**$428,894.39**
Deborah L. Bush	Back Pay:	$32,152.97
	Front Pay:	$70,625.15

[2] All amounts awarded by the jury for front pay and emotional distress have been reduced to the present values incorporated herein by stipulation of the parties. All amounts of prejudgment interest are calculated on the back pay award through 12/5/00. All amounts of post-judgment interest are calculated on the total award for the period between 12/06/00 and 03/28/02 (the date of the Second Amended Judgment) at the rate of 6.052%, compounded annually.

Judgment Plaintiff	**Amount of Judgment**[2]	
	Emotional Distress:	$111,578.41
	Prejudgment Interest:	$5,621.96
	Post Judgment Interest:	$20,248.51
	TOTAL:	**$240,227.00**
William F. Chabot	Back Pay:	$0.00
	Front Pay:	$0.00
	Emotional Distress:	$119,734.85
	Prejudgment Interest:	$0.00
	Post Judgment Interest:	$9,615.82
	TOTAL:	**$129,350.67**
Allen E. Cromer	Back Pay:	$17,326.06
	Front Pay:	$0.00
	Emotional Distress:	$74,734.85
	Prejudgment Interest:	$3,029.47
	Post Judgment Interest:	$9,028.08
	TOTAL:	**$104,118.46**
Thedrick L. Eighmie	Back Pay:	$25,585.00
	Front Pay:	$0.00

Judgment Plaintiff	**Amount of Judgment**[2]	
	Emotional Distress:	$40,275.00
	Prejudgment Interest:	$4,473.54
	Post Judgment Interest:	$7,703.15
	TOTAL:	**$78,036.69**
Paul M. Gundersen	Back Pay:	$14,820.15
	Front Pay:	$0.00
	Emotional Distress:	$130,578.41
	Prejudgment Interest:	$2,591.31
	Post Judgment Interest:	$13,075.16
	TOTAL:	**$161,065.03**
Clifford J. Levendusky	Back Pay:	$21,461.17
	Front Pay:	$0.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$3,752.49
	Post Judgment Interest:	$13,787.09
	TOTAL:	**$164,000.75**
Clifford B. Meacham	Back Pay:	$0.00

Judgment Plaintiff	**Amount of Judgment**[2]	
	Front Pay:	$0.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$0.00
	Post Judgment Interest:	$10.038.66
	TOTAL:	**$135,038.66**
Bruce E. Palmatier	Back Pay:	$2,841.28
	Front Pay:	$13,211.05
	Emotional Distress:	$175,000.00
	Prejudgment Interest:	$496.81
	Post Judgment Interest:	$15,611.36
	TOTAL:	**$207,160.50**
Neil R. Pareene	Back Pay:	$63,050.37
	Front Pay:	$0.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$11,024.39
	Post Judgment Interest:	$21,051.78
	TOTAL:	**$220,125.84**
James R. Quinn	Back Pay:	$12,460.52
	Front Pay:	$0.00

Judgment Plaintiff	Amount of Judgment[2]	
	Emotional Distress:	$44,000.00
	Prejudgment Interest:	$2,178.73
	Post Judgment Interest:	$5,709.97
	TOTAL:	**$64,349.22**
William C. Reynheer	Back Pay:	$179,740.17
	Front Pay:	$102,380.00
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$31,427.66
	Post Judgment Interest:	$49,654.28
	TOTAL:	**$488,202.11**
John K. Stannard	Back Pay:	$58,242.97
	Front Pay:	$0.00
	Emotional Distress:	$141,703.46
	Prejudgment Interest:	$10,183.81
	Post Judgment Interest:	$21,552.87
	TOTAL:	**$231,683.11**
Allen G. Sweet	Back Pay:	$0.00
	Front Pay:	$0.00

Judgment Plaintiff	**Amount of Judgment**[2]	
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$0.00
	Post Judgment Interest:	$10,038.66
	TOTAL:	**$135,038.66**
David W. Townsend	Back Pay:	$18,126.82
	Front Pay:	$25,121.50
	Emotional Distress:	$175,000.00
	Prejudgment Interest:	$3,169.48
	Post Judgment Interest:	$19,237.66
	TOTAL:	**$240,655.46**
Carl T. Woodman	Back Pay:	$33,920.18
	Front Pay:	$42,344.21
	Emotional Distress:	$125,000.00
	Prejudgment Interest:	$5,930.96
	Post Judgment Interest:	$19,363.82
	TOTAL:	**$226,559.17**

5. Each of the foregoing "Total" Amounts listed above shall continue to accrue interest at the rate of

6.052% from March 28, 2002, until the date the judgment is satisfied.

6. The plaintiffs are granted judgment against defendants KAPL, Inc., and Lockheed Martin Corporation pursuant to the Age Discrimination in Employment Act in the amount of $873,868.09, which represents attorneys' fees incurred for all prevailing plaintiffs through November 22, 2000, less the sum of $48,689.03 which has been attribute to plaintiff Christine Palmer who settled her case with the defendants following the jury's verdict, leaving an award for attorney's fee in the net amount of **$825,179.06,** which amount shall accrue interest at the rate of 6.052%, compounded annually, from March 28, 2002, (the date of this Second Amended Judgment) until this Third Amended Judgment is satisfied.

7. The plaintiffs are granted judgment against defendants KAPL, Inc., and Lockheed Martin Corporation pursuant to the Age Discrimination in Employment Act in the amount of $23,483.02 which represents costs incurred on behalf of all prevailing plaintiffs through November 22, 2000, less the sum of $1,304.53 which has been attributed to plaintiff Christine Palmer, leaving an award for costs in the net amount of **$22,178.49,** which amount shall accrue interest at the rate of 6.052%, compounded annually, from March 28, 2002, (the date of this Second Amended Judgment) until this Third Amended Judgment is satisfied.

8. The plaintiffs are granted judgment against defendants KAPL, Inc., and Lockheed Martin Corporation pursuant to the Age Discrimination in Employment Act in the amount of $90,243.37, which

represents attorneys' fees incurred for all prevailing plaintiffs for the time period between November 22, 2000 and April 5, 2002, which amount shall accrue interest at the rate of 6.052%, compounded annually, from the date of this Third Amended Judgment until the judgment is satisfied.

9. The plaintiffs are granted judgment against defendants KAPL, Inc., and Lockheed Martin Corporation pursuant to the Age Discrimination in Employment Act in the amount of $5,334.00 which represents costs incurred on behalf of all prevailing plaintiffs for the time period between November 22, 2000 and April 5, 2002, which amount shall accrue interest at the rate of 6.052%, compounded annually, from the date of this Third Amended Judgment until the judgment is satisfied.

IT IS SO ORDERED AND ADJUDGED.

DATED: May 14, 2002
Albany, New York

/s/
DAVID R. HOMER,
UNITED STATES
MAGISTRATE
JUDGE

APPENDIX F

[E-295]

Guide

Strictly Private *Page 1*

KAPL, Inc.

Manager's Guide to Exempt Reduction in Force Implementation

The process for selecting individuals to be impacted by a business requirement for a reduction in force is difficult. However, the following guidelines provide a framework for assuring that the process is equitable and unbiased.

Layoff Matrix (Exhibit A)

- List all employees in your group on the matrix.
- Rank them in each of the three categories using a Bell Curve concept.

• Performance: Refer to the two most recent Performance Appraisals and average the rating.

P.A. Rating	Matrix Value
Unsatisfactory	0
Marginal	2
Satisfactory	4
Good	6
Excellent	8
Outstanding	10

- Flexibility: Rate the employee's flexibility within the Laboratory. Can his or her documented skills be used in other assignments that will add value to current or future Lab work? Is the employee retrainable for other Lab assignments?

- Critical Skills: How critical are the employee's skills to continuing work in the Lab? Is the individual's skill a key technical resource for the NR program? Is the skill readily accessible within the Lab or generally available from the external market?

Use the following rating continuum for both Flexibility and Critical Skills.

LOW	MEDIUM	HIGH
0 1 2 3	4 5 6 7	8 9 10

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KAPL, Inc.

Manager's Guide to Exempt Reduction in Force Implementation

- Company Service: Enter the appropriate rating for the employee's length of Company Service.

Service Years	Matrix Value
<2	0
2 - 5	2
6 - 10	4
11 - 15	6
16 - 20	8
21+	10

BEST AVAILABLE COPY

Total the ratings for each employee. The employee with the most points is the most valuable to your organization and should be Ranked #1. Rank all employees based on the total points. There should not be any ties, i.e., if there are ten employees in the group, they should be ranked 1 - 10; not 1-2-2-2-3-4, etc. If two employees have the same Total points perform a paired comparison to determine which should have the higher rank,

Layoff Identification (Exhibit B)

Based upon the number of positions you must reduce, select the lowest ranked employees and complete the Layoff Identification form. Recommend other positions, if applicable, within the Lab for which each employee should be considered based upon the employee's documented skills.

Adverse Impact Analysis

Once the individuals have been identified, perform an analysis to determine whether your planned actions might have a disparate impact on a protected class of employees. This analysis will test the validity of your selection decisions and give an opportunity to 'fix' potential problems before a charge is filed.

- Minority/Female Impact (Exhibit C): A test often used by the Equal Employment Opportunity Commission (EEOC) to establish disparate treatment is called the 20% or 4/5's rule. This rule finds that if the selection rate for a protected group is greater than 120% of the rate for the total population a serious discrepancy exists.

KAPL, Inc.

Manager's Guide to Exempt Reduction in Force Implementation

Example of 4/5's Rule

	Total	#RIF	%RIF	4/5 Rule	% Total Before RIF	% Total After RIF
Exempt	250	30	12.0			
Minority	18	4	22.2	14.4	7.2	6.4
Female	75	10	13.3	14.4	30.0	29.5

4/5's rule: 120% of %RIF (1.2*12.0 = 14.4)

Note potential disparate impact of minorities (22% > 14.4)

- Age Impact (Exhibit D): A similar analysis should be performed to assure that we are not violating the Age Discrimination in Employment Act (ADEA).

Review Board

The completed matrix should be reviewed with your HR Rep and then with the Review Board. The Review Board members will review your matrix and documentation to assure adherence to downsizing principles as well as minimal impact on the business and employees.

See Exhibit E for presentation guidelines.

Legal/Management Approvals

Your final RIF selections and impact analysis must be reviewed, and approved by Legal and the General Manager, KAPL.

[E-298] [0003497] STRICTLY PRIVATE

LAYOFF MATRIX

ORGANIZATION: _____ CRITICAL SKILLS _____

MANAGER: _____ _____

DATE COMPLETED: _____ _____

EMPLOYEE NAME	PERFORMANCE	CO. SERVICE	FLEXIBILITY	CRITICALITY	TOTAL	RANK

PERFORMANCE: AVG LAST 2 P.A.s		COMPANY SERVICE		FLEXIBILITY, CRITICALITY
P.A. RATING	NUMERIC VALUE	YEARS	NUMERIC VALUE	LOW MEDIUM HIGH
Unsatisfactory	0	< 2	0	0 1 2 3 4 5 6 7 8 9 10
Marginal	2	2 - 5	2	FLEXIBILITY:
Satisfactory	4	6 - 10	4	Documented Lab relevant
Good	6	11 - 15	6	skills beyond primary
Excellent	8	16 - 20	8	skills? Can be trained for
Outstanding	10	21 +	10	other Lab roles?
				CRITICALITY: Key technical knowledge for NR program? Would skill have to be replaced? Is skill in Lab?

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COMPLETING THE LAYOFF MATRIX MANAGER'S GUIDE

1) LAYOFF COMMUNITY DEFINITION: With your Human Resources Representative, identify those employees performing similar work to the position identified for elimination/consolidation. Lay-off communities must be approved by the Manager - Professional Staffing prior to evaluating employees using the Layoff Matrix. (Note: Communities may cut across several sections)

2) PREPARING THE LAYOFF MATRIX: With the guidance of the Community Lead, the managers evaluating the community must agree on the critical skills ("Criticality") needed now and in the future. List these critical skills in the space provided on the Layoff Matrix Form.

3) COMPLETING THE LAYOFF MATRIX:

Evaluate each employee in the areas of: performance, company service, flexibility and criticality of skills using the following criteria:

PERFORMANCE: Using the following numeric values, average the employee's last two performance appraisals and record this number under the "PERFORMANCE" heading.

P.A. RATING	NUMERIC VALUE
Unsatisfactory	0
Marginal	2
Satisfactory	4
Good	6
Excellent	8
Outstanding	10

COMPANY SERVICE: Using the following numeric values, record the employee's service in the "CO. SERVICE" heading.

YEARS	NUMERIC VALUE
< 2	0
2 - 5	2
6 - 10	4
11 - 15	6
16 - 20	8
21 +	10

FLEXIBILITY: On a scale of 0-10 (0 = low 10 = high), rate the employee's flexibility in the Laboratory. Does the employee have documented Lab-relevant skills, other than his or her primary skills, that can add value to current or future Lab work? Is this employee retrainable to perform other Lab assignments?

CRITICALITY OF SKILLS: On a scale of 0-10 (0 = low 10 = high), rate the employee on criticality of skills. Is this employee the sole owner, or

one of few, who possess key technical knowledge for the NR program? Is this skill readily accessible in the Lab? Would this skill have to be replaced?

Total each employee's points

Rank each employee based on total points, most points = #1 – least points = N

[E-300] [E0003500]

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LAYOFF MATRIX

ORGANIZATION: EXAMPLE

MANAGER: _____

DATE COMPLETED: _____

CRITICAL SKILLS _____

_____

_____

EMPLOYEE NAME	PERFORMANCE	CO. SERVICE		FLEXIBILITY	CRITICALITY	TOTAL	RANK	
Ken	5	25	10	1	1	17	5	X
Amy	2	8	4	1	2	9	7	X
Paul	9	36	10	7	7	33	1	
Larry	4	18	8	3	3	18	4	
Irving	8	32	10	2	2	22	2	
Nancy	6	4	2	1	2	11	6	X
Carl	6	15	6	4	6	22	3	

[table entries handwritten]

PERFORMANCE: AVG LAST 2 P.A.s		COMPANY SERVICE		FLEXIBILITY, CRITICALITY
P.A. RATING	NUMERIC VALUE	YEARS	NUMERIC VALUE	LOW MEDIUM HIGH
Unsatisfactory	0	< 2	0	0 1 2 3 4 5 6 7 8 9 10
Marginal	2	2 - 5	2	FLEXIBILITY:
Satisfactory	4	6 - 10	4	Documented Lab relevant
Good	6	11 - 15	6	skills beyond primary
Excellent	8	16 - 20	8	skills? Can be trained for
Outstanding	10	21 +	10	other Lab roles?
				CRITICALITY: Key technical knowledge for NR program? Would skill have to be replaced? Is skill in Lab?

[E-301] [E0003501]

STRICTLY PRIVATE EXHIBIT B

KAPL LAYOFF IDENTIFICATION

ORGANIZATION_____ DATE_____

EMPLOYEE NAME	SKILL GROUP	SERVICE DATE	EEO	SEX	BIRTH DATE	SUITABLE POSITION ALTERNATIVE

APPROVAL SIGNATURES:

MANAGER _____ HR _____

SECTION MANAGER _____

[E-302] [E0003502]

STRICTLY PRIVATE EXHIBIT B

KAPL LAYOFF IDENTIFICATION

ORGANIZATION _____ DATE _____

EMPLOYEE NAME	SKILL GROUP	SERVICE DATE	EEO	SEX	BIRTH DATE	SUITABLE POSITION ALTERNATIVE
Impacted employee's position can NOT be backfilled !!						

APPROVAL SIGNATURES:

MANAGER _____ HR _____

SECTION MANAGER _____

[E-303] [0003504]

KAPL EXEMPT LAYOFF IMPACT ANALYSIS

ORGANIZATION _____ DATE _____

ANALYSIS OF MINORITIES/FEMALES IMPACT

	TOTAL	#LOW	%LOW	*4/5 RULE	% TOTAL BEFORE RIF	% TOTAL AFTER RIF
EXEMPT						
MINORITY						
FEMALE						

*120 of Total % LOW

Potential disparate impact if % minority or female LOW > 4/5 Rule

[E-304] [0003505]

STRICTLY PRIVATE EXHIBIT C

KAPL EXEMPT LAYOFF IMPACT ANALYSIS

ORGANIZATION EXAMPLE DATE

ANALYSIS OF MINORITIES/FEMALES IMPACT

	TOTAL	#LOW	%LOW	*4/5 RULE	% TOTAL BEFORE RIF	% TOTAL AFTER RIF
EXEMPT	250	30	12.0	–	–	–
MINORITY	18	4	22.2	14.4	7.2	6.4
FEMALE	75	10	13.3	14.4	30.0	29.5

[table entries handwritten]

*120 of Total % LOW

Potential disparate impact if % minority or female LOW > 4/5 Rule

[E-305] [0003506]

KAPL EXEMPT LAYOFF AGE IMPACT ANALYSIS

ORGANIZATION_____ DATE_____

EMPLOYEES BY AGE GROUP

	Below 40		40-44		45-49		50-54		55-59		60-64		65-69	70+	
	#	%	#	%	#	%	#	%	#	%	#	%	#	#	%
CURRENT TOTAL															
AFFECTED BY RIF															
TOTAL AFTER RIF															

[E-306] [0003507]

STRICTLY PRIVATE EXHIBIT D

KAPL EXEMPT LAYOFF IMPACT ANALYSIS

ORGANIZATION EXAMPLE DATE

EMPLOYEES BY AGE GROUP

	Below 40		40-44		45-49		50-54		55-59		60-64		65-69		70+	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
CURRENT TOTAL																
AFFECTED BY RIF																
TOTAL AFTER RIF																

SUMMARY AGE IMPACT

	NUMBER	SUM OF AGES	AVERAGE AGE
TOTAL EXEMPTS	250	12,867	51.5
TOTAL RIF	30	1,618	53.9
TOTAL AFTER RIF	220	11,249	51.1

[table entries handwritten]

[E-307] [0020660]

Review Board Presentation Outline

I. Organization
- give an overview of the Section structure
- highlight areas of excess skills or open positions
- identify the targeted population and give rationale

II. Matrix
- discuss flexibility and criticality criteria
- discuss individuals at bottom of matrix
- identify any issues

III. Next steps
- what other positions should be considered as suitable offers
- how will the work be accomplished after the RIF

[E-308] [0020659]

KAPL Review Board

Presentation Format

Talking Points:

Rationalization for population selected, e.g. elimination of work or position.

How were the positions selected?

Discussion of matrix and how individuals were selected. Should they receive a suitable offer (are there other positions they could move to)?

Issues surrounding the selection
- with the individuals
- with the work group

Is the work going away? If not, how will it be transitioned?

Discuss impact analysis data; ..y issues?

Have you addressed all your excess skill areas?

What skills/positions do you still need to fill?

Supporting Documentation:

Bring the original plus ~~three copies~~ overhead T/P of:

- budget analysis worksheet
- matrix
- adverse impact analysis

APPENDIX G

[E-309] [0003489]

Manager Information Sessions

November 27 – 30, 1995

- RIF Policy Review
- Employee Identification Process
- Reviews and Approvals

[E-310] [0003490]

KAPL, Inc. Salaried RIF Policy

- Business need to reduce costs / staff
  - Not a substitute for performance appraisals
- Identify job skills/classifications
- Evaluate all employees in affected categories
- Exempt / Non-exempt differences
  - in evaluation
  - in implementation

[E-311] [0003491]

Non-exempt RIF Process

- Evaluation is based on Company service
- Least senior in classification within Section gets notice
  - Suitable offer to open position
  - Bumps less senior employee in similar position
- Refusal of suitable offer equals resignation

[E-312] [0003492]

Exempt RIF Process

- Identify population/skills to be affected
- Rank all employees based on:
  - Work performance
  - Criticality of skills to Lab operation
  - Flexibility
- Factor in length of service
- Use matrix sheet for consistency

[E-313] [0003499]

Critical Skills

- Differentiate position vs. individual's skills
- All skills are important, but . . .
- Some skills more unique/critical to Lab operation and NR Program
  - Are there others in the Lab who can learn/perform this function?

[E-314] [0003493]

What is the Population?

- What is needed to meet Lab objectives?
- Whole organization or targeted areas
  - Specific units
  - Specific skill categories/job classifications

[E-315] [0003494]

Population EXAMPLE

- Review work load and skill mix
- Options:

#1 Reduce only in area where work will decrease

#2 Reduce only in area of excess skills

#3 Reduce equally across all subsections

[E-316] [0003495]

ARP Example

Component	Actual	Option 1	Option 2	Option 3
TOTAL	316	6	6	6
681	9			
682	33	2		1
683	34			1
684	28			1
685	49			
686	43	4		1
687	57		6	1
688	14			
689	3			
77	46			1

[E-317] [0003498]

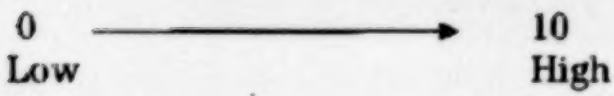
Flexibility

- How adaptable are they to other work
  - previously held other positions
- Skills beyond those needed in current position
- Exhibits willingness to assist other functions/areas within the Lab

[E-318] [0003496]

Matrix

- List ALL employees in defined population
- Rate performance
  - documented P.A.
  - average last two years
- Rate Flexibility and Critical Skills
- Add rating for Company service



SUMMARY AGE IMPACT

	NUMBER	SUM OF AGES	AVERAGE AGE
TOTAL EXEMPTS			
TOTAL RIF			
TOTAL AFTER RIF			

[E-319] [0003508]

Review Board

- Discuss rationale for population selected
- Review matrix
- Discuss individuals identified
  - any issues
  - other suitable opportunities
- How will work be transitioned
- Review impact analysis

[E-320] [0003509]

Next Steps

• Complete matrix/analysis	11/28-29
• Meet with Review Board	11/30-12/1
• Legal/GM review	12/1-12/4
• Attend manager forum	12/5
• Notify employees	12/6

APPENDIX H

[E-321]

KAPL REVIEW BOARD

PRESENTATION FORMAT

TALKING POINTS:

1) RATIONALIZATION FOR ELIMINATION OF WORK/ POSITION

2) HOW HAVE THESE POSITIONS BEEN SELECTED?

3) HOW HAVE THESE EMPLOYEES BEEN SELECTED: PROCESS?

4) ISSUES SURROUNDING THESE PROPOSED ACTIONS/ HOW WILL WORK BE HANDLED IN THE FUTURE?

5) ARE THERE ANY ISSUES REGARDING THE IDENTIFIED EMPLOYEES THAT WE SHOULD BE AWARE OF?

6) TIMING: WHY NOW?

SUPPORTING DOCUMENTATION, INCLUDING BUDGET/ MANPOWER FORECASTS MAY BE REQUESTED DURING THE REVIEW.

APPENDIX I

[E-250] [page 1]

- [CHECK SOUND PICK-UP IN ROOM]
- It's been about a year since my last review with you on the State of the Business.
- This year I want to:
- Review the direction that we set last year,
- Highlight a few of our accomplishments that reinforce this direction,

BEST AVAILABLE COPY

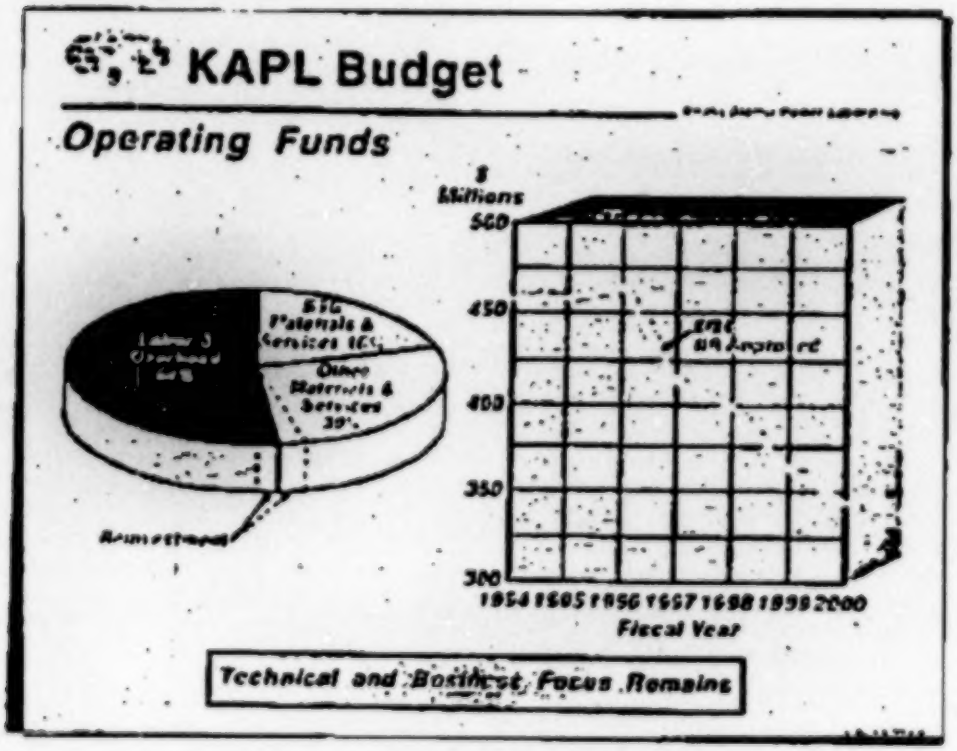
- Take a quick look at the uncertain environment that demands a sound strategy and high performance standards,

- Take a candid look at our performance in this environment, and,

- finally, I want to challenge you to be players in making change.

- I will also provide an opportunity for you to ask questions . . . please think while I talk.

[E-251] [page 19]

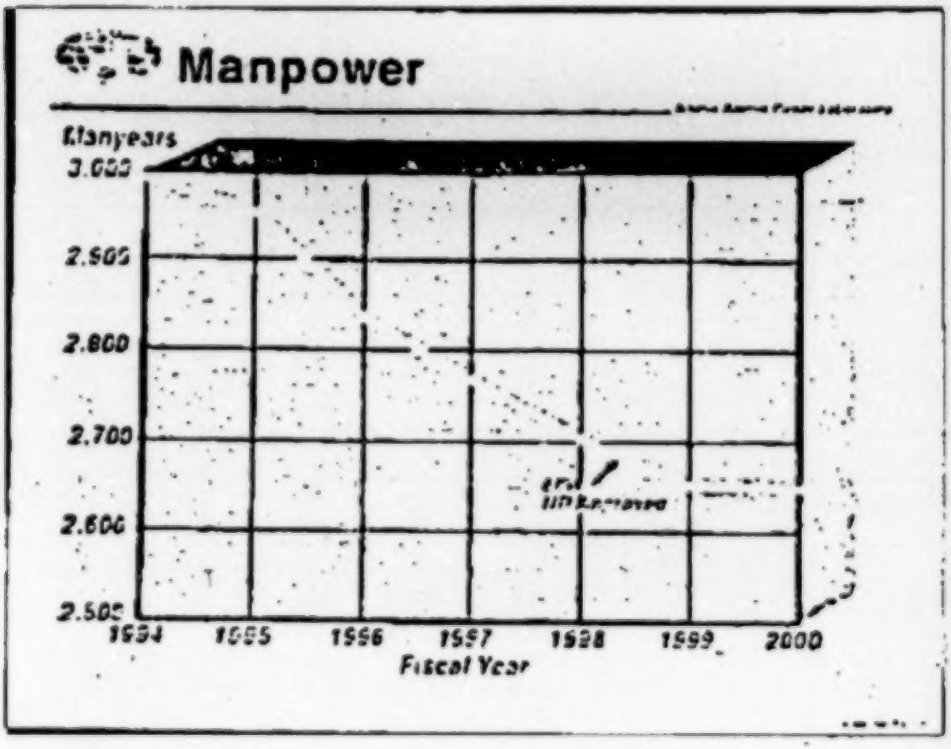


- This environment is perhaps most directly felt in terms of its impact on our budget.

- This chart shows about a 25% reduction in our operating budget, driven mostly by the change in funding of S9G subcontract design work from R&D to directly funded Navy construction funding.

- However, this reduction is also driven, in part, by the reduction in Laboratory manning.

[E-252] [page 20]



- This chart shows the downsizing challenge we currently face

- If these numbers hold up, we must reduce Lab staffing by about 150 people over the next two years.

- But the real challenge is to do this while supporting our changing work requirements: As we and the Program decide to stop work in one area and start

different work in another area, the nature of the work and the required skills can change significantly. For example, D1G is coming down; Alternate Cycles is staffing up . . .

- This means we need people who can make this kind of transition. People who are versatile and motivated to retrain and work in unfamiliar areas, like the people who move into the QA NDT area.
- If we are able to do this, and if our staffing plans and historical attrition trends hold, I believe we can meet our ceiling targets without a significant LOW situation
- If there are some areas where we can not do this as well as we need to, we will handle them on a case-by-case basis with voluntary-type actions or selected LOWs.
- But this budget environment continues to be uncertain. We need to perform, and we need to be flexible. The more people are able to broaden their skill base, the better off we will be and the better prepared for any eventuality each person will be.

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No. 06-1505

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IN THE

Supreme Court of the United States

Clifford B. Meacham, *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory, *et al.*

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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HP

QUESTION PRESENTED

Whether an employee alleging disparate impact under the Age Discrimination in Employment Act, 29 U.S.C. § 623, bears the burden of persuasion on the "reasonable factors other than age" defense.

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in this case include Raymond Adams, Wallace Arnold, Deborah Bush, William Chabot, Allen Cromer, Thedrick Eighmie, Belinda Gundersen (as appointed representative of her late husband, Paul Gundersen), Clifford Levendusky, Clifford Meacham, Bruce Palmatier, Neil Pareene, James Quinn, Margaret Reynheer (as appointed representative of her late husband, William Reynheer), John Stannard, Allen Sweet, David Townsend, and Carl Woodman.

The defendants include KAPL, Inc., Lockheed Martin Corp., and John J. Freeh.

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BRIEF FOR THE PETITIONERS

Petitioners Clifford B. Meacham *et al.* respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-32a) is published at 461 F.3d 134. A prior decision of the court of appeals (Pet. App. 33a-69a) is published at 381 F.3d 61. The magistrate judge's order denying respondents' motion for judgment as a matter of law (Pet. App. 70a-154a) is published at 185 F. Supp. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2006. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on January 8, 2007. Pet. App. 155a-56a. On April 3, 2007, Justice Ginsburg extended the time in which to file a petition for certiorari until May 9, 2007. The petition was filed on that date and granted January 18, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Appendices to this brief reproduce the relevant provisions of: (A) the Age Discrimination in Employment Act, 29 U.S.C. § 623; (B) the Equal Pay Act of 1963, 29 U.S.C. § 206; (C) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2;

(D) regulations of the Department of Labor, 29 C.F.R. §§ 860.102, 860.103 (1968); and (E) regulations of the Equal Employment Opportunity Commission, 29 C.F.R. § 1625.7(e).

STATEMENT

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, prohibits employment practices that have an unjustified disparate impact on older workers, subject to the "reasonable factors other than age" (RFOA) defense in Section 4(f)(1) of the Act.

In this case, after a five and a half week trial, a jury found that respondents had violated the ADEA by implementing a reduction in force process that had just such an unjustified disparate impact on older workers. Respondents never asked the jury to decide whether that disparate impact was caused by "reasonable factors other than age." Nonetheless, a divided panel of the Second Circuit held that there was insufficient evidence to sustain the jury's verdict because petitioners, as the plaintiffs, bore the burden of disproving the reasonableness of respondents' conduct under the RFOA provision and failed to sustain that burden. The question before this Court is whether the court of appeals was correct in placing that burden of proof on the plaintiffs or whether, instead, the RFOA provision establishes a traditional affirmative defense upon which the defendant bears the burden of persuasion.

1. Section 4(a) of the ADEA provides that "[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which

would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2).

In deciding that this provision authorizes a disparate impact claim, *City of Jackson* relied in large part on the Court's prior interpretation of the virtually identical language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2). See 544 U.S. at 233-37. In particular, the Court relied heavily on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Court had construed Title VII to prohibit practices that have an unjustified disparate impact on protected employees as well as intentionally discriminatory employment practices. 401 U.S. at 429-30. The Court later held that *Griggs*'s disparate impact analysis applies not only to employment tests and criteria, like those at issue in *Griggs* itself, but also to an employer's "system of subjective decisionmaking," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1989), like the one challenged in this case.

In subsequent decisions, including *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), this Court provided a framework for considering disparate impact claims under Title VII. First, the "'plaintiff must begin by identifying the specific employment practice that is challenged'" and show that the challenged practice has a significantly disparate "impact . . . on employment opportunities" for protected workers. *Id.* at 656 (quoting *Watson*, 487 U.S. at 994). If that burden is satisfied, "the case will shift to any business justification [the employer] offers for [its] use of these practices . . . ." *Id.* at 658.

This so-called "business necessity test"[1] contains two components: "first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less [disparate] impact." *Id.* With respect to the business justification, "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. On this question, the "employer carries the burden of producing evidence of a business justification for his employment practice" but the "burden of persuasion . . . remains with the disparate-impact plaintiff." *Id.* If the employer produces evidence of a business justification, and the employee fails to rebut it, the employee may yet prevail by identifying "alternatives to [the employer's] hiring practices that reduce the racially disparate impact of practices currently being used" and would be "equally effective . . . in achieving [the employer's] legitimate employment goals." *Id.* at 660-61.

In *City of Jackson*, the Court affirmed that the same test governs disparate impact claims under the ADEA. The Court observed that while Congress had acted to modify the *Wards Cove* framework in the Civil Rights Act of 1991, Pub. L. No. 02-166, 105 Stat. 1071, it had not extended those revisions to the ADEA. "Hence, *Wards Cove*'s pre-1991 interpretation

---

[1] In *Griggs*, the Court used the term "business necessity." 401 U.S. at 431. In *Wards Cove*, the Court used the term "business justification." 490 U.S. at 658. Like the court of appeals, petitioners use the terms interchangeably in this brief.

of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240.

The Court further recognized a second difference between the ADEA and Title VII, arising from Section 4(f)(1) of the ADEA, which provides that:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . .

29 U.S.C. § 623(f)(1). In light of this "reasonable factors other than age" (RFOA) provision, it is not enough that the employee makes out a case of discrimination under *Wards Cove*. "Unlike the business necessity test" under Title VII, "which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." 544 U.S. at 243.

2. Respondent KAPL, Inc., operates the Knolls Atomic Power Laboratory under a contract with the Department of Energy. Pursuant to that contract, the Department sets annual staffing levels for the Lab. Pet. App. 37a. The present litigation arose after the Department notified respondents that the staffing level for the Lab for fiscal year 1996 would be 108 positions below the prior year's level. *Id.* at 38a. When informed of the Government's decision, some managers expressed concern about the prospect of losing younger workers in the impending staffing reductions and about the aging of KAPL's workforce in general. *See, e.g.*, Tr. 1952-57, 1641-45; C.A. App. A-672.

To meet the reduced staffing budget, and to accommodate additional hiring the laboratory wished to undertake, respondents concluded that they would need to eliminate 143 positions. Pet. App. 38a. They initially attempted to meet this goal though a voluntary separation plan (VSP), offering workers financial incentives to take early retirement. Planners estimated that up to 250 employees at the Lab would be interested in taking the offer, more than enough to meet the Lab's lowered staffing budget. *Id.* Respondents, however, decided to limit participation in the VSP to only those workers with twenty or more years of service. *Id.* As a result, respondents granted early separation to only 107 workers, leading to the need for an involuntary reduction in force (IRIF). *Id.* at 39a.

Respondents' plan for the IRIF proceeded in two steps. *See generally* J.A. 94-98. First, respondents developed staffing budgets for units within the lab. Pet. App. 39a. Managers of over-budget units were then required to identify particular positions within the unit for inclusion in the IRIF based on an "excess skills" analysis. *Id.* Respondents then considered individuals within those positions for termination.

At the second stage, respondents required over-budget managers to put the termination candidates from their units into a "matrix." Each manager then evaluated the employees on his or her matrix, giving up to ten points in each of four categories: (1) performance; (2) "flexibility"; (3) "criticality of [the worker's] skills"; and (4) years of service. Pet. App. 39a; *see also* J.A. 94-95. Respondents gave managers substantial discretion, and little guidance, in scoring workers on "flexibility" and "criticality." They told

managers that scores for "flexibility" should take into account whether an "employee's 'documented skills [could] be used in other assignments that [would] add value to current or future Lab work . . . .'" Pet. App. 39a; *see also* J.A. 95. As for guidance on "criticality," respondents told managers that "[c]ritical skills were those skills that were critical to continuing work in the Lab as a whole," taking into account whether the skill was a "key technical resource" and whether it was available elsewhere in the external labor market. Pet. App. 5a-6a; *see also* J.A. 95. Although respondents were aware of their obligation to avoid imposing an unjustified disparate impact on older workers, Pet. App. 39a-40a, a number of managers testified at trial that "they received no training on avoiding age discrimination in the IRIF." *Id.* at 64a.

This highly subjective process produced "startlingly skewed results." Pet. App. 7a. At the time of the terminations, KAPL employed 2,063 exempt employees,[2] 58% of whom were forty years of age or older. *Id.* at 74a-75a. Managers selected 245 employees to be included in the matrices and considered for termination. Of those, 73% were over forty. *Id.* at 75a. Of the thirty-one eventually selected for termination, all but one (97%) were over forty. *Id.*

Petitioner's expert later testified at trial that the chances of randomly selecting thirty-one employees from KAPL's workforce and ending up with thirty over the age of forty was approximately one in

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[2] "Exempt employees" are workers, generally salaried professionals, who are exempted from the minimum wage and overtime requirements of the FLSA. *See* 29 U.S.C. § 213(a)(1).

348,000. Pet. App. 42a.[3] Moreover, her statistical analysis demonstrated that the age disparity among those selected from the matrices for termination arose principally from the scores managers gave older workers for "flexibility" and "criticality." *Id.*

Perhaps aware that the substantial discretion given to front-line supervisors under the plan could be used to give effect to overt or subconscious bias, *cf. Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), respondents identified a number of auditing measures they deemed both necessary and reasonable to protect against that risk. Pet. App. 40a; J.A. 96-98. First, the plan called for managers to conduct adverse impact analyses to determine whether there was evidence that the discretionary authority bestowed on lower level managers was being misused to give effect to unlawful bias. *Id.* Second, respondents established a review board to "assess[] the managers' selections 'to assure adher[e]nce to downsizing principles as well as minimal impact on the business and employees.'" *Id.* Third, "KAPL's general manager, John Freeh, and its chief counsel, Richard Correa, were to review the final IRIF selection and the impact analyses." *Id.*

Respondents, however, failed to implement any of these precautions in a meaningful manner. First, although the plan called for managers to conduct a disparate impact analysis, none did. Instead, a single employee, Linda Geiszler in the human resources

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[3] The chances of selecting 31 workers from the matrices (upon which older workers were disproportionately represented) and ending up with all but one over the age of forty was 1 in 73, also a statistically significant number. *Id.* at 42a.

department, reviewed the results of the IRIF on behalf of the company. Ms. Geiszler "neither received instruction on how to conduct such an analysis . . . nor read any book or articles on how to do it." Pet App. 41a. Although the plan suggested using the traditional four-fifths rule – under which, the plan stated, "if the selection rate for a protected group is greater than 120% of the rate for the total population[,] a serious discrepancy exists," *id.* at 40a – Geiszler instead "compared the average age of KAPL's 2000-plus employees before and after the IRIF and found no significant difference." *Id.* at 64a. Respondents subsequently admitted that the analysis "was incapable of identifying any disparate impact on older employees." *Id.* at 100a.[4]

Although the inadequacy of Geiszler's review was "self-evident," Pet. App. 100a, the review board did nothing about it. *Id.* at 64a. In fact, like Ms. Geiszler, the board members "received no training on age discrimination," and perhaps as a consequence, they made no attempt to monitor for age discrimination at all. *Id.*

Nor did KAPL's general manager or chief counsel take adequate steps to determine whether the IRIF had been infected with age discrimination. KAPL officials were aware of the skewed results. Pet. App. 99a. Nonetheless, chief counsel Correa did not object to Geiszler's patently inadequate disparate impact analysis, asserting at trial both that "an impact

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[4] To reduce the average age of a 2,000-person work force by five years, from an average of forty-five to forty, the thirty-one terminated workers would have had to be, on average, 362 years old.

analysis is only required for race and sex"[5] and that there was "no way to determine whether [Geiszler's analysis was] appropriate or not, since there's no guidance on it." *Id.* at 41a. And although he purported to conduct a "complete legal review of the IRIF process," *id.*, his "review was far from systematic and appears to have consisted primarily of having a paralegal check the managers' math" on the matrices. *Id.* at 61a. Indeed, Correa "did not look at who was placed on the matrices," id. at 41a, and did not consider their ages, Tr. 1287. Of the more than twenty-nine managers who participated in the rating system, Correa interviewed only three. Tr. 1290-91.

At trial, petitioners' expert testified that "the procedures established for review of the decisions made by individual managers 'did not offer adequate protections to keep the prejudices of managers from influencing the outcome.'" Pet. App. 18a. The Second Circuit later agreed that the evidence "could easily have led the jury to conclude that KAPL could have made simple adjustments to the criticality and flexibility criteria that would have led to a nondiscriminatory distribution of layoffs." *Id.* at 61a.

The district court likewise found that the jury could reasonably conclude that respondents "were aware that the implementation of the guidelines for the IRIF would result in a disparate impact on older employees . . . but took no meaningful steps to avoid or mitigate that impact." Pet. App. 99a. Indeed, the court found that the "jury was entitled to infer from

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[5] Respondents would later insist that despite binding circuit precedent to the contrary, the ADEA does not prohibit disparate impact. *See* Pet. App. 43a.

[the] evidence that KAPL was motivated to disregard the disparate impact of the IRIF on older employees by its desire to hire new and younger employees." *Id.* at 100a.

3. Petitioners, twenty-eight of the KAPL employees terminated during the IRIF,[6] sued respondents[7] in January, 1997, asserting disparate treatment and disparate impact claims under the ADEA.[8]

At the close of evidence, the court instructed the jury to determine disparate impact liability on the basis of the burden-shifting analysis of *Wards Cove*, in accordance with then-current circuit law. *See Smith v. Xerox Corp.*, 196 F.3d 358, 364-65 (2d Cir. 1999); Tr. 4711-41 (jury charge); J.A. 73-74 (Special Verdict Form). Although respondents had raised the ADEA's "reasonable factors other than age" provision as an affirmative defense in their answer, C.A. App. A-139, they did not ask for a jury instruction on the defense[9] or object when the Special Verdict Forms did

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[6] Of those, seventeen are petitioners in this Court, nine settled their claims before final judgment, and two non-exempt employees did not bring disparate impact claims.

[7] The defendants were KAPL, Inc., its parent company, Lockheed Martin Corp., and KAPL's general manager, John J. Freeh.

[8] Petitioners also sued under the New York Human Rights Law, N.Y. Exec. Law § 290 *et seq.* (McKinney 2001). Those claims are not before the Court.

[9] Respondents did ask that the jury be instructed that petitioners were required, during the first step of the *Wards Cove* analysis, to prove that the disparate impact felt by older workers was the result of their age. Tr. 4733-34. However, they did not request an instruction directing the jury to consider the reasonableness of the practices creating the disparate impact.

not require the jury to decide whether respondents had, in fact, acted on the basis of an RFOA. J.A. 73-74; Tr. 4453-4458, 4741. Moreover, while they contested the validity of the Second Circuit's recognition of disparate impact liability under the ADEA, they did not challenge that court's determination that the standards for proving disparate impact under the ADEA (if such a cause of action existed) were set forth in *Wards Cove*.

After receiving the charge and deliberating on the evidence, the jury returned a verdict for petitioners on the disparate impact claims and for respondents on the claims of disparate treatment. J.A. 62-75.

On December 19, 2000, defendants filed a Rule 50(b) motion seeking judgment as a matter of law. C.A. App. A-1646 to A-1647. The district court denied the motion, Pet. App. 102a, and respondents appealed.

4. The Second Circuit affirmed. Pet. App. 36a. After reaffirming circuit precedent recognizing a disparate impact cause of action under the ADEA, *id.* at 52a, the court rejected respondents' assertion that petitioners had submitted insufficient evidence to sustain their burdens under *Wards Cove*.

In particular, the court held that plaintiffs had made out a prima facie case of disparate impact by identifying a specific employment practice – the "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" Pet. App. 60a – which caused a substantial disparate impact on older workers. *Id.* at 59a. The court then found that respondents had proffered a legitimate business justification for the practice, namely the need to "reduce its workforce while still retaining employees

with skills critical to the performance of KAPL's functions." *Id.* However, the court concluded that plaintiffs had succeeded at establishing "at least one suitable alternative": "KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias." *Id.* at 60a-61a.

5. Shortly thereafter, this Court issued its decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005). When respondents petitioned for certiorari, the Court vacated the Second Circuit's judgment and remanded for reconsideration in light of *City of Jackson*. 544 U.S. 957 (2005).

6. On remand, a divided panel of the Second Circuit reversed course and ordered entry of judgment for respondents as a matter of law.

a. The panel majority concluded that the court's prior analysis was "untenable on this remand because, in *City of Jackson*, the Supreme Court held that the 'business necessity' test is not applicable in the ADEA context; rather the appropriate test is for 'reasonableness' . . . ." Pet. App. 9a. Although respondents had never asked the jury to determine whether their IRIF practices fell within the "reasonable factors other than age" defense of Section 4(f)(1), the majority nonetheless undertook to decide for itself whether the evidence supported a finding under that provision. *Id.* at 11a.[10]

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[10] In so doing, the court rejected, without discussion, petitioners' argument that respondents' had waived any right to rely on the RFOA provision. *See* C.A. Plaintiffs' Remand Reply Br. 4-5.

To decide that question, the panel first asked "who bears the burden of persuasion with respect to the 'reasonableness' of the employer's proffered business justification under the ADEA disparate-impact framework." Pet. App. 11a. The majority acknowledged that the Equal Employment Opportunity Commission (EEOC) – which is charged with administering the statute and had filed an amicus brief in the case addressing the question – took the view that the RFOA provision creates an affirmative defense upon which the defendant bears the burden of persuasion. *Id.* at 13a n.6; *see also* C.A. EEOC Remand Br. 14-17, 461 F.3d 134 (2d Cir. 2006) (No. 02-07378(L)). The court likewise acknowledged that the language of the provision – permitting an exemption for "otherwise prohibited" conduct – "suggests an affirmative defense." *Id.* at 13a. Indeed, the majority recognized that the RFOA defense "is listed in the statute after the bona fide occupational qualification (BFOQ) exception – an affirmative defense for which the Supreme Court has strongly suggested the employer bears the burden of persuasion." *Id.* (citations omitted). But the majority nonetheless concluded that, contrary to the apparent plain meaning of the text, this Court's decision in *City of Jackson* required a different result.

In particular, the court believed that *City of Jackson* required "substituting the 'reasonableness' test" of the RFOA provision "for the 'business necessity test'" of *Wards Cove*. Pet. App. 11a. Because the plaintiff bears the burden of proof on the business necessity test, the majority reasoned, the Court must have intended the plaintiff to bear the burden of proof on the replacement RFOA test as well. *Id.* at 11a-12a. To hold otherwise, the majority

thought, would "compromise the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the 'legitimacy' of its business justification." *Id.* at 12a. Moreover, imposing the burden on the employer would also, the majority concluded, conflict with *City of Jackson*'s observation that disparate-impact liability is narrower under the ADEA than under Title VII. *Id.* at 12a-13a.

The majority further found support for its view in "the history of the development of the 'business necessity' test," which, the majority believed, arose from an interpretation of Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).[11] Pet. App. 14a. That provision, the majority noted, "like the RFOA provision in the ADEA, lends itself to interpretation as an affirmative defense." *Id.* at 15a. However, the court concluded, "the Supreme Court has determined that it is not," *id.* at 15a, thereby supporting the view that the RFOA provision is not either.

The majority then applied its standard of proof to the evidence in this case and concluded that the district court had erred in denying respondents' Rule 50(b) motion. The court acknowledged the many serious deficiencies in the IRIF process, including respondents' failures to implement the protections they themselves had determined to be reasonable means to guard against age discrimination. Pet. App. 17a-18a. But the majority nevertheless found that the measures respondents had taken were "not unreasonable." *Id.* at 19a (citation omitted).

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[11] Section 703 is reproduced in Appendix C to this brief.

b. Judge Pooler dissented, concluding that that the RFOA provision creates an affirmative defense and that respondents had waived the defense by not asserting it to the jury. Pet App. 21a-32a.

In the dissent's view, the majority "impermissibly conflate[d] the Supreme Court's holding on an age discrimination disparate impact analysis with its holding on the RFOA defense." *Id.* at 23a. Properly read, the dissent argued, *City of Jackson* held that the RFOA defense serves as "a statutory exemption to liability otherwise established by plaintiffs under a disparate impact analysis." *Id.* at 24a. Whether the plaintiff has established that liability, in turn, is determined by applying "the entire *Wards Cove* analysis." *Id.* Thus, "the burden of proving a disparate impact claim remains exactly as it is described in *Wards Cove*," Judge Pooler concluded, "but that does not mean that the burden of proving the statutory RFOA exemption has been changed by *Wards Cove* or by *City of Jackson*." *Id.* at 30a.

Instead, the dissent argued, the nature of the RFOA provision should be determined by ordinary rules of statutory construction. Pet. App. 25a. In Judge Pooler's view, "existing cases, legislative history, and statutory structure overwhelmingly support the view that employers bear the burden of establishing a[n] RFOA [defense]." *Id.* This conclusion was further supported, she argued, by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990). That statute was passed in reaction to this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 181 (1989), which had held that "the benefit plan exemption" under Section 4(f)(2) did not

create an affirmative defense. Judge Pooler explained that at the time of *Betts*, Section 4(f)(2) did not include any language specifying that its exemptions applied only to conduct "otherwise prohibited" by the ADEA, in contrast with Section 4(f)(1) and the RFOA provision. *Id.* at 26a. When this Court construed Section 4(f)(2) as not creating an affirmative defense, Congress overruled that result by, among other things, inserting the "otherwise prohibited" language of Section 4(f)(1) into Section 4(f)(2). *Id.* at 28a. That change, and the legislative history explaining it, demonstrated Congress's understanding that the employer would also bear the burden under the similarly worded RFOA exemption. *Id.*

Having concluded that the RFOA provision establishes an affirmative defense, Judge Pooler would have found the defense waived by respondents' failure to assert it to the jury. Pet. App. 31a-32a. "From all that appears in the record before us," she observed, "defendants may have made a strategic decision not to press the RFOA defense, believing that it would be easier to require plaintiffs to establish disparate impact under the *Wards Cove* analysis than for defendants themselves to prove a reasonable factor other than age." *Id.* at 32a.

7. The Second Circuit denied petitioners' subsequent petition for rehearing and rehearing en banc, Pet. App. 155a-56a, and this Court then granted certiorari limited to the first question presented by the petition. 128 S. Ct. 1118 (2008) (mem.).

SUMMARY OF ARGUMENT

Petitioners proved to the satisfaction of a jury, the district court, and the court of appeals that respondents' unaudited reliance on subjective decisionmaking during an involuntary reduction in force had a substantial and unnecessary negative impact on the employment rights of older workers. Under the basic standards for disparate impact claims applicable to most cases, that showing would conclusively establish liability. Respondents nonetheless seek shelter in a special provision of the ADEA that exempts "otherwise prohibited" conduct from liability when based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1). Congress's formulation of the defense – as an exemption from the general prohibitions of a statute – marks it as a classic example of an affirmative defense upon which the defendant bears the burden of proof. Having found that the defendant has inflicted significant harms on older workers that could have been avoided through equally effective alternative means, a jury should be entitled to view with modest skepticism the employer's claims of innocence, requiring the employer to show that its conduct was at least "reasonable" before leaving the injured employees to bear the cost of the employer's otherwise unlawful conduct.

That conclusion flows from the language, history, and purposes of the RFOA provision. Indeed, this Court has read similarly worded exceptions in the ADEA and the Equal Pay Act as creating affirmative defenses. Thus, the Court has construed the RFOA provision's immediate neighbor – the "bona fide occupational qualification" exemption – as an

affirmative defense. And the Court has construed the nearly identically worded "any other factor other than sex" defense of the Equal Pay Act as also imposing the burden of proof on the employer who claims its shelter.

Giving consistent meaning to common textual formulations in related statutes is important in its own right and in this case yields an entirely sensible result. Employers are better positioned to defend the reasonableness of their practices, having greater access to the information that is most likely to be relevant to the jury's deliberations. At the same time, placing the burden of persuasion on the employer strikes an appropriate balance between the need to ensure effective enforcement of the Act with the employers' interest in maintaining substantial leeway in determining how to conduct their operations.

If there is any ambiguity in the statute, the Court should defer to the reasonable construction consistently applied by the federal agencies charged with administering the ADEA. Within six months of the Act's passage, the Department of Labor authoritatively construed the RFOA provision as establishing an affirmative defense. In the years since enforcement responsibility was transferred to the EEOC, that agency has continued to express the same understanding. These agencies' longstanding, contemporaneous view of the statute is entirely reasonable and entitled to deference.

The court of appeals' reliance on this Court's decisions in *City of Jackson* and *Wards Cove* to reach a contrary conclusion is misplaced. The Court was clear in *City of Jackson* that the RFOA provision, by

its terms, comes into play only after the plaintiffs have established that the challenged practice is "otherwise prohibited" by the general proscriptions of the ADEA. And that determination, the Court explained, is made under the traditional *Wards Cove* analysis. Accordingly, the RFOA provision operates independently of the *Wards Cove* analysis, providing an additional affirmative defense to employers who would otherwise be held liable under the *Wards Cove* analysis standing alone. The fact that the employee bears the burden of proof on all the elements of the *Wards Cove* analysis, including "business necessity," provides no basis for believing that the employee also bears the burden of negating the employer's reliance on the entirely separate RFOA defense that is unique to the ADEA and bears all the markings of a traditional affirmative defense.

ARGUMENT

I. The Text, Structure, And History Of The RFOA Provision Establish It As An Affirmative Defense.

The ADEA does not expressly state which party bears the burden of persuasion under the RFOA exception in Section 4(f)(1). 29 U.S.C. § 623(f)(1). However, the text and structure of the provision follow a familiar pattern this Court has long construed as establishing an affirmative defense under which the defendant invoking the exception bears the burden of proof. Moreover, because the defense is relevant only to conduct "otherwise prohibited" by the act – and therefore, presumptively illegal – requiring the employer to sustain the burden of proving the reasonableness of its otherwise

unlawful conduct strikes an appropriate balance between the need to protect employers from unwarranted liability and the equally important need to ensure that the ADEA's disparate impact cause of action can serve its intended function.

A. The RFOA Provision Creates An Exception To A General Prohibition, A Formulation Long Understood To Establish An Affirmative Defense.

The "burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . . ." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *see, e.g.*, *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (applying rule to hold that the "burden of proving the applicability of the supervisory exception [to the protections of the National Labor Relations Act] should thus fall on the party asserting it"); *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967) (applying the "general rule" that "the burden of proof is on . . . [the] one [who] claims the benefits of an exception to the prohibition of a statute"); *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910) ("When a proviso like this carves an exception out of the body of a statute or contract, those who set up such exception must prove it.") (collecting cases); *see also Dixon v. United States*, 126 S.Ct. 2437, 2443 (2006) (noting that "at common law, the burden of proving affirmative defenses—indeed, all circumstances . . . of justification, excuse or alleviation—rested on the defendant.") (citations omitted).

As the Court recognized in *City of Jackson*, the RFOA provision operates as just such an exception to liability for otherwise unlawful conduct. *See* 544 U.S. at 238-39 (plurality opinion); *id.* at 246 (Scalia, J., concurring in part and concurring in the judgment). Section 4 of the ADEA begins by defining a series of unlawful employment practices for employers, employment agencies, and labor organizations.[12] Subsection (f) then contains "the ADEA's five affirmative defenses," *TWA v. Thurston*, 469 U.S. 111, 122 (1985), three of which are contained in subsection (f)(1):

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action ***otherwise prohibited*** under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or ***where the differentiation is based on reasonable factors other than age***, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located . . . .

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[12] The text of Sections 4(a)-(f) of the ADEA is set forth in Appendix A to this brief.

29 U.S.C. § 623(f)(1).[13]

"As this text makes clear, the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA." *City of Jackson*, 544 U.S. at 246 (Scalia, J., concurring in part and concurring in the judgment).[14] And as such, it represents a classic example of an affirmative defense.

B. This Court Has Applied The General Rule That Exceptions To Liability Operate As Affirmative Defenses With Special Vigor In Interpreting The Fair Labor Standards Act, Through Which The ADEA Is Enforced.

Application of the general rule treating exceptions to liability as affirmative defenses is particularly appropriate in the case of the ADEA because the statute is enforced through the Fair Labor Standards Act.

Nearly half a century ago, this Court was able to say that it was "well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed." *Mitchell v. Ky. Finance Co.*, 359 U.S. 290, 295 (1959) (collecting cases). *See also A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend

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[13] Subsection (f)(2) provides exemptions for certain "bona fide seniority system" and "bone fide employee benefit plans." Subsection (f)(3) exempts employee discharge and discipline decisions based on "good cause." 29 U.S.C. §§ 623(f)(2)-(3).

[14] Unsurprisingly, both the House and Senate reports on the ADEA explicitly referred to the Section 4(f) defenses as "exceptions." H.R. Rep. 90-805, at 9 (1967), *reprinted in* 1967 U.S.S.C.A.N. 2213, 2218; S. Rep. No. 90-723, at 9 (1967).

an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."). This Court continues to recognize the rule to this day. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996); *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993).

As a corollary to the narrow construction principle, the "general rule [is] that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). *See also, e.g.*, *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966) ("[T]he burden of proof respecting exemptions is upon the company . . . ."); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 393 (1960) (holding that "any employer who asserts that his establishment is exempt [from the FLSA] must assume the burden of proving" entitlement to the exemption) (citation omitted); *Walling v. Gen. Indus. Co.*, 330 U.S. 545, 547-48 (1947) (same).

Congress was undoubtedly aware of these principles when it declared that violations of the ADEA "shall be deemed prohibited under section 15 of the Fair Labor Standards Act," 29 U.S.C. § 626(b), and when it created an exemption to such "otherwise prohibited" conduct in the RFOA provision using language drawn from of the Equal Pay Act,[15] which

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[15] *Compare* 29 U.S.C. § 206(d)(1) (prohibiting sex-based pay differentials for equal work with exception for "differential[s] based on any other factor other than sex") *with id.* § 623(f)(1) (prohibiting age discrimination with exception for

was enacted as an amendment to the FLSA. *See, e.g.*, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction . . . ."); *Corning Glass Works*, 417 U.S. at 196-97 (applying narrow construction principle to exemption under the Equal Pay Act); *id.* at 190 (noting that Equal Pay Act was enacted as an amendment to the FLSA).

C. This Court Has Construed Similar Defenses Within The ADEA And Closely Related Employment Discrimination Statutes As Creating Affirmative Defenses.

Applying these established interpretative rules, this Court has repeatedly construed as affirmative defenses other exceptions in Section 4(f)(1) and in other employment discrimination statutes.

1. The language of the RFOA provision can trace its origins to the Equal Pay Act (EPA), 29 U.S.C. § 206(d). Like the ADEA, the EPA begins with a general prohibition against workplace discrimination, in this case prohibiting unequal wages for equal work on the basis of sex. *See* 29 U.S.C. § 206(d)(1).[16] Next, the EPA establishes a series of exceptions to the general rule, including a defense for pay

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"differentiation[s] based on any reasonable factors other than age"). *See* Equal Pay Act of 1963, Pub. L. 88-38 § 3, 77 Stat. 56, 56 (enacting statute as amendment to the FLSA).

[16] The full text of the Equal Pay Act is set forth in Appendix B to this brief.

"differential[s] based on any other factor other than sex.'" *Id.*

In *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), this Court held that the EPA's exceptions to liability, including the "any other factor other than sex" defense, constitute affirmative defenses upon which the employer bears the burden of persuasion. "[W]hile the Act is silent on this question, its structure and history . . . suggest that once the [plaintiff] has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, *the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions.*" 417 U.S. at 196 (emphasis added). The Court explained that this holding was "consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Id.* at 196-97. *See also County of Washington v. Gunther*, 452 U.S. 161, 168-69 (1981) (noting that the EPA's "four affirmative defenses" operate to allow differentiations in pay that "might otherwise violate the Act").

"[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *City of Jackson*, 544 U.S. at 233 (plurality opinion) (citation omitted). In this case, just four years after enacting the "any other factor other than sex" affirmative defense in the EPA, Congress used nearly identical language to create the RFOA defense in a

similarly-structured statute that served the same basic purpose of preventing employment discrimination. If Congress had intended a different allocation of burdens of proof under the two defenses, it presumably would have done more than simply insert the word "reasonable" into the RFOA provision.

2. Equally instructive, this Court has held that the employer bears the burden of persuasion on the ADEA's defense for a "bona fide occupational qualification" (BFOQ), an exception codified within the same sentence as the RFOA defense. *See* 29 U.S.C. § 623 (f)(1) ("It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsection (a) . . . of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . ."); *City of Jackson*, 544 U.S. at 233 n.3 (observing that "the ADEA provides an affirmative defense to liability where age is a 'bona fide occupational qualification'"); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412-17 & n.24 (1985) (same); *Johnson v. Mayor & City Council of Balt.*, 472 U.S. 353, 361 (1985) (same).

Moreover, while this Court has never confronted the question, the third defense in Section 4(f)(1) – excusing otherwise prohibited discrimination when "compliance with [the Act] would cause such employer . . . to violate the laws of the country in which such workplace is located," 29 U.S.C. § 623(f)(1) – also establishes an affirmative defense. The provision is written as an exemption from

liability and turns on a question that the employer – by definition a multinational corporation that has an independent obligation to discover and abide by the foreign law at issue – is far better positioned to address than an individual employee. Accordingly, in a 1989 policy guidance on the "foreign laws" exemption, the EEOC stated its view that in order to prevail under this provision, the "*employer must prove* that compliance with the ADEA would cause it to run afoul of a foreign law." EEOC, *Policy Guidance: Analysis of the Sec. 4(f)(1) "Foreign Laws" Defense of the Age Discrimination in Employment Act of 1967* (Dec. 5, 1989) (emphasis added), *available at* http://www.eeoc.gov/policy/docs/foreignlaws-adea.html.

There is no reason to believe that Congress intended that the various defenses in Section 4(f)(1) – separated by nothing more than commas – would vary fundamentally in their allocation of burdens of proof. Indeed, in indistinguishable circumstances, this Court concluded in *Corning Glass Works* that *all* of the defenses listed together in Section 3(d) of the Equal Pay Act – including both that statute's BFOQ exemption and its neighboring "any other factor other than sex" defense, 29 U.S.C. § 206(d)(1) – constitute affirmative defenses. 417 U.S. at 196; *see also Gunther*, 452 U.S. at 168-69 (same).

It is thus understandable that in *Thurston*, this Court referred to Section 4(f) of the ADEA as setting out "the ADEA's five affirmative defenses." 469 U.S. at 122. While the statement in *Thurston* is not controlling, the statutory text and structure which presumably led to the observation also lead

inexorably to the conclusion that the Second Circuit erred in placing the burden of disproving the RFOA defense on the plaintiffs.

3. The court of appeals nonetheless found support for its position in Section 703(h) of Title VII, which provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h). *See* Pet. App. 14a.

The court started from the premise that this provision was "the source of the 'business necessity' test" in Title VII. *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 n.21 (1975)). It then reasoned that because the employee bears the burden of proof on the business necessity test under *Wards Cove*, Section 703(h) must not be an affirmative defense, notwithstanding all appearances to the contrary. Pet. App. 14a-15a. And if Section 703(h) of Title VII is not an affirmative defense, the court reasoned, the RFOA provision of the ADEA – which the court viewed as a substitute for the business necessity test in age discrimination cases – must not be one either. *Id.* at 15a. This line of reasoning is flawed at every step.

First, Section 703(h) is not the source of the business necessity test. Although the Court did discuss Section 703(h) in *Griggs*, it did not base the

business necessity test on that provision. To the contrary, the Court developed the test without any reference at all to Section 703(h), relying instead "primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view." *City of Jackson*, 544 U.S. at 235 (plurality opinion). *See Griggs*, 401 U.S. at 432. In fact, the Court turned to Section 703(h) only after concluding that the employer's practice *failed* the business necessity test. *See id.* at 432. *Two pages later*, the opinion discusses the employer's contention that one of its challenged practices – employing general intelligence tests – was "specifically permitted by § 703(h) of the Act." 401 U.S. at 433. The Court rejected that contention not on the ground that the practice failed the business necessity test, but rather because it did not satisfy the requirements the EEOC had developed for applying Section 703(h) to professionally developed tests. *See id.* at 433-36. While the considerations were similar, the Court made clear that Section 703(h) was not the source of the business necessity test, as the provision by its plain terms "applies only to tests. It has no applicability to the high school diploma requirement." *Id.* at 433 n.8.[17]

Second, as discussed below, the court of appeals was wrong to conclude that the RFOA provision

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[17] Accordingly, the passing dicta in *Albemarle* – stating that "[i]n *Griggs*, the Court was construing" Section 703(h), 422 U.S. at 425 n.21 – is accurate as far as it goes. The Court *did* construe Section 703(h) in *Griggs*. But to the extent the *Albemarle* footnote could be read to suggest that Section 703(h) was the *source* of the disparate impact test developed in *Griggs*, the statement, which had no bearing on the holding in *Albemarle*, is incorrect.

operates as a substitute for the "business necessity" analysis in disparate impact cases. *See infra*, Section III(A).

Third, even if *Griggs* had established that the employee bears the burden of proof with respect to professionally developed tests under Section 703(h), there is a significant textual difference between Section 703(h) and the RFOA provision.

As discussed above, the RFOA provision provides a defense for conduct "otherwise prohibited" by the Act. 29 U.S.C. § 623(f)(1). As a result, the RFOA provision unmistakably creates an exception to liability, invoking the rule that exceptions to liability are construed as affirmative defenses. *See supra*, Section I(A). Section 703(h), on the other hand, contains no such language. While the provision does begin with the phrase "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice . . .", that formulation does not establish an exception for conduct that is *necessarily* otherwise unlawful. Such language can be used to provide a safe harbor for conduct that, while otherwise lawful under the other provisions of the Act, might be subject to dispute. Accordingly, while the formulation used in Section 703(h) does strongly suggest the creation of an affirmative defense – as demonstrated by the Court's construction of the similar language in Title VII's BFOQ provision as an affirmative defense[18] – the

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[18] *See* 42 U.S.C. § 2000e-2(h); *Criswell*, 472 U.S. at 416-17 (noting that its construction of the ADEA BFOQ defense was consistent with "the parallel treatment of such questions under Title VII"); *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (treating Title VII BFOQ provision as an affirmative

inclusion of the "otherwise prohibited" language in Section 4(f)(1) of the ADEA removes any doubt that Congress intended *that* provision to establish an affirmative defense.[19]

Thus, the RFOA provision bears a far greater resemblance to its companion Section 4(f)(1) BFOQ defense, which this Court has already construed to be an affirmative defense. Likewise, in looking to other statutes for analogs, the Court would do far better to look to the nearly identically worded "any other factor other than sex" affirmative defense in the Equal Pay Act.

* * * * *

Just as "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments," *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008), Congress is entitled to rely on this Court to give the same construction to commonly used terms and formulations across similar statutes and over time. Treating the RFOA provision as an affirmative defense is necessary both to maintain coherence in the law and to maintain stable background principles against which Congress may legislate with confidence.

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defense); *id.* at 221-22 (White, J., concurring in part and concurring in the judgment) (same); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989) (same).

[19] In *City of Jackson*, this Court rejected the dissent's suggestion that the RFOA provision operates as a "safe harbor" for conduct that would not violate the statute in any event. *See* 544 U.S. at 238-39; *see also id.* at 252 (O'Connor, J., concurring in the judgment).

D. Construing The RFOA Provision As An Affirmative Defense Is Consistent With Traditional Policy Rationales For Distributing Burdens And With The Balance Of Interests Struck By The Statute.

Placing the burden of proof on the employer also is consistent with the policy considerations that often underlie Congress's allocation of the burdens of proof, as well as with the purposes underlying the ADEA.

1. It is "entirely sensible to burden the party more likely to have information relevant to [the matter] with the obligation to demonstrate [those] facts . . . ." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993); *see also Dixon v. United States*, 126 S. Ct. 2437, 2443 (2006) ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.") (quoting 2 J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)).

In general, the employer is "more likely to have information relevant" to the reasonableness of its actions. *Concrete Pipe & Prods*, 508 U.S. at 626. For one thing, the employer is best positioned to establish the purposes behind its business practices. *Cf. City of Jackson*, 544 U.S. at 242 (assessing reasonableness in light of employer's "goal of raising employees' salaries to match those in the surrounding communities"). Likewise, the employer is best positioned to establish the reasonableness of the methods by which it has chosen to pursue those objectives. For example, the employer in *City of Jackson* justified its pay practices in part by asserting that its revised pay scales were "based on a survey of comparable communities," *id.* at

241-42, evidence uniquely within the province of the employer that created it.[20] Rather than require plaintiffs to hypothesize and debunk every conceivable basis for a decision, based on information often in the employer's sole possession, Congress sensibly chose to establish the RFOA provision as an affirmative defense and to place the burden on the defendant. *Cf. Ky. River Cmty. Care, Inc.*, 532 U.S. at 711 (noting that "practicality" weighs against requiring a party to disprove the applicability of all of the many potential justifications for an exemption from liability).

2. Giving the employer the burden of proving its RFOA defense also strikes a sensible balance between the interest in providing employers reasonable protection from ADEA liability and the equally important need to ensure that the Act remains a potent tool for rooting out action (often founded in hidden or unconscious stereotypes that are difficult to discover or prove) that unjustifiably deprives older workers of the employment opportunities Congress intended to afford them.

Even bearing the burden of proof under the RFOA provision, employers still enjoy substantial protections from unwarranted liability under the

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[20] In this case, respondents likewise attempted to explain the skewed results of their IRIF process by pointing to their evaluation of which positions had "excess skills" and which workers had skills that would "add value to current or future lab work." Pet. App. 39a. Respondents naturally had much better access to information relevant to the distribution of skills throughout the facility and which skills were likely to be of value to the future work of the laboratory (as well as the what that "future work" might be).

ADEA. As the Court made clear in *City of Jackson*, the RFOA provision only has application with respect to conduct that is "otherwise prohibited under" the Act's general proscription against age discrimination. 544 U.S. at 238 (plurality opinion) (quoting 29 U.S.C. § 623(f)(1)); *id.* at 246 (Scalia, J., concurring in part and concurring in the judgment). Accordingly, the employer is not put to the proof on its RFOA defense until the plaintiffs have sustained their initial burden of proving a disparate impact, without the benefit of the liberalizing provisions of the 1991 Civil Rights Act. *See City of Jackson*, 544 U.S. at 240-41.

At the same time, the Court has also been clear that the burden of establishing an RFOA is not unduly onerous. For example, "[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *City of Jackson*, 544 U.S. at 243. Thus, in choosing among reasonable practices, the employer is not required to choose the one with the least disparate impact. *Id.*

The degree of protection afforded employers by these requirements and limitations is demonstrated by the very limited success of ADEA disparate impact claims after *City of Jackson*. *See* Jessica Sturgeon, Note, Smith v. City of Jackson: *Setting An Unreasonable Standard*, 56 DUKE L.J. 1377, 1397 (2007) (surveying post-*City of Jackson* litigation and finding that "[l]ower courts . . . have generally dismissed employees' complaints during the pleading stage"); Aïda M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v.

City of Jackson *Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 ALB. L. REV. 143, 180 (2006) ("[I]t is difficult [even after *City of Jackson*] to imagine scenarios under which disparate-impact cases might be fruitful.").

Thus, there is no reason to think that placing the burden of meeting the modest requirements of the RFOA defense on the employer would lead to any unintended impairment of employer interests. Certainly, there is no evidence, for example, that employers in the Ninth Circuit – which has long treated the RFOA provision as an affirmative defense, *see Criswell v. W. Air Lines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985) – have been subjected to pervasive unwarranted liability.

On the other hand, while Congress surely intended to afford employers reasonable protection from unwarranted disparate impact claims under this statute, it just as surely did not intend to establish a cause of action that offered nothing more than a false promise of relief to workers. Congress was aware that older workers faced a very real risk of being "fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). That concern is at its zenith in a case such as this, in which an employer authorizes individual supervisors to exercise substantial discretion in selecting the least competent and flexible workers for termination. While endowing front line supervisors with such discretionary authority is not, in itself, unusual or illegal, it "does not follow, however, that the particular supervisors to whom this discretion is

delegated always act without discriminatory intent." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). To the contrary, such discretionary processes create a very real risk that individual managers may act on unspoken, or even unconscious, stereotypes of older workers as inherently less capable and insufficiently flexibility to adapt to the times. *Id.* Thus, "even if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain." *Id.*[21] Requiring the employer to bear the limited burden of proving the reasonableness of an otherwise unlawful business practice allows the disparate impact cause of action to perform its important function of rooting out practices based in illegal discrimination that would otherwise go undetected and unremedied.

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[21] Although the jury ultimately concluded that petitioners failed to meet their burden of proof on their disparate treatment claims, there was evidence suggesting grounds to worry about stereotypes and prejudices infecting the IRIF process. *See* Pet. App. 100a. Beyond the "startlingly skewed results" of the IRIF, *id.* at 7a, petitioners presented evidence that some managers charged with selecting individuals for termination had openly worried about having too many older workers and about the need to make room to hire younger employees. Tr. 1952-57, 1641-45; C.A. App. A-672. "Such remarks may not prove discriminatory intent, but they do suggest a lingering . . . problem" of the type the ADEA was enacted to combat. *Watson*, 487 U.S. at 990.

II. The Agencies Charged With Administration Of The ADEA Have Consistently Viewed The RFOA Provision As Establishing An Affirmative Defense.

To the extent the Court finds any ambiguity in the statute, it should defer to the reasonable interpretation of the federal agencies charged with its enforcement.

1. Just six months after Congress enacted the ADEA, the Secretary of Labor, who had been given initial enforcement authority under the Act,[22] issued interpretative regulations construing two of the Section 4(f)(1) exceptions – the "bona fide occupational qualification" (BFOQ) and the RFOA provisions – as affirmative defenses.

Addressing the BFOQ provision first, the Secretary explained that "as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer . . . which relies upon it." 29 C.F.R. § 860.102 (1968).[23]

The Secretary then reached the same conclusion with respect to the RFOA defense:

> Further, in accord with a long chain of decisions of the Supreme Court of the United

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[22] ADEA, Pub. L. No. 90-202 § 9, 81 Stat. 602, 605 (1967). Enforcement authority was transferred to the EEOC effective July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978. *See* Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R., 1978 Comp. at 321, *reprinted in* 92 Stat. 3781 (1978).

[23] As noted above, this Court subsequently concurred in that interpretation, relying in part on the agency's construction. *See Criswell*, 472 U.S. at 416-17 & n.24.

> States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

29 C.F.R. § 860.103(e) (1968).

When the EEOC assumed responsibility for ADEA enforcement in 1979 it continued to construe the BFOQ and RFOA provision as affirmative defenses, both through its regulations, *see* 29 C.F.R. § 1625.6 (BFOQ); 29 C.F.R. § 1625.7(e) (RFOA),[24] and in amicus briefs. As initially drafted, 29 C.F.R. § 1625.7(e) provided that the "burden of proof in establishing that the differentiation was based on factors other than age is upon the employer." Proposed Interpretations: Age Discrimination in Employment Act, 44 Fed. Reg. 68,861 (Nov. 30, 1979). As finally adopted, the regulation provides that "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. § 1625.7(e).

While the current regulation speaks most directly to the burden of proof in disparate *treatment* cases, there is no basis to believe that a different allocation

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[24] When the EEOC issued its own ADEA regulations, it rescinded those previously issued by the Department of Labor. *See* 46 Fed. Reg. 47,724 (Sep. 29, 1981).

of burdens would apply in disparate *impact* cases.[25] And in litigation over the past twenty years, including in this very case, the Commission has in fact interpreted its regulations and the statute to place the burden of persuasion on the RFOA defense upon the employer. *See* U.S. Invitation Br. 7 (collecting cases); EEOC C.A. Br. 14.

2. This is "an absolutely classic case for deference to agency interpretation." *City of Jackson*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment). The ADEA expressly authorized the Department of Labor, and later the EEOC, to issue "such rules and regulations as it may consider necessary or appropriate for carrying out" the statute. 29 U.S.C. § 628. Pursuant to that authority, both agencies promulgated regulations – the EEOC after notice and comment, *see* 46 Fed. Reg. 47,724, 47,727 (1981) – making clear their view that the burden of proof under the RFOA provision falls upon the employer. "[S]uch a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). In this case, the administrative interpretation has remained consistent for nearly 40 years.

Accordingly, the Commission's position is controlling so long as it is reasonable. *See EEOC v.*

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[25] To the extent the present regulation may be unclear, the EEOC's interpretation of that regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation and internal quotation marks omitted). *See also Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1010 (2008).

Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) ("[T]he EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."); *see also United States v. Mead Corp.*, 533 U.S. 218, 229-31 & n.12 (2001); *Chevron U. S. A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[26] And as argued above, the Commission's position is not only reasonable, but represents the best view of the language, structure, history and purposes of the statute.[27]

3. Deference is especially warranted in this case because Congress amended the ADEA to address the burden of proof under a related provision in 1990, but did nothing to disturb the Commission and the Department of Labor's long-standing position that the employer bears the burden of proving the RFOA defense. *See, e.g.*, *Associated Dry Goods Corp.*, 449

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[26] Even setting aside the regulations, the agency's interpretation of the statute, expressed in its amicus briefs, is entitled to respect. *See, e.g.*, *Fed. Express Corp. v. Holowecki*, No. 06-1322, slip op. 5-8 (U.S. Feb. 27, 2008).

[27] Nor does *City of Jackson* detract from the authority or validity of the relevant regulation, contrary to the court of appeals' suggestion. *See* Pet. App. 13a-14a n.6. To the contrary, the Court in *City of Jackson* agreed in substantial part with the agency's interpretation of the statute as expressed in its regulations, with the possible exception of the Commission's view that liability could be avoided only if a practice causing a disparate impact were justified as a "business necessity." *See* 544 U.S. at 239-40, 243. But that potential disagreement is no ground for declining to defer to the Agency's view on a *different* question, expressed in a *different* subsection of the regulations. *Compare* 29 C.F.R. § 1625.7(d) (addressing business necessity) *with id.* at § 1625.7(e) (addressing burden of proof under RFOA provision). *See City of Jackson*, 544 U.S. at 247 (Scalia, J., concurring in part and concurring in the judgment).

U.S. at 600 n.17 (noting where "Congress has never expressed its disapproval" of a long-held position of the EEOC, "its silence in this regard suggests its consent to the Commission's practice").

In 1990, Congress enacted the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978, to respond to this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989). In that case, the Court considered, among other things, the burden of proof under Section 4(f)(2) of the ADEA, which provided at the time that "[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter." 29 U.S.C. § 623 (f)(2) (1989). Although "it appears on first reading to describe an affirmative defense," the Court had construed the provision to be "not so much a defense . . . as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context." *Id.* at 181. Consequently, the Court held that "ADEA plaintiffs must bear the burden of showing subterfuge." *Id.* at 182.[28]

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[28] There are important textual and practical differences between Section 4(f)(2) as it existed at the time that *Betts* was decided and the RFOA defense in Section 4(f)(1). While the RFOA provision applies only to employer conduct "otherwise prohibited" by the Act, 29 U.S.C. § 623(f)(1), the "bona fide employee benefit" provision included no such exemption-creating language at the time of *Betts*. That difference was significant because without it, the Court was able to conclude that the BFOQ provision "redefines the elements of a plaintiff's prima facie case *instead of establishing a defense to what otherwise would be a violation* of the Act." *Betts*, 492 U.S. at 181

Congress acted promptly to overrule *Betts* and "restore the original congressional intent in passing and amending the Age Discrimination in Employment Act." Pub. L. No. 101-433, § 101, 104 Stat. 978, 978 (1990). The statute amended Section 4(f)(2) to expressly provide that the employer bears the burden of proof under the "bona fide seniority" and "bona fide employee benefit plan" exceptions. *Id.* § 103. In so doing, Congress adopted the view of the EEOC regulations, which had construed Section 4(f)(2) – like Section 4(f)(1) and its BFOQ and RFOA defenses – to impose the burden of proof on the employer. *See* 29 C.F.R. § 1625.10 (1989).

Given the express congressional adoption of the EEOC's interpretation of Section 4(f)(2), it is unsurprising that Congress did nothing to reverse the agency's long-standing position that the employer bears the burden of proof on the RFOA defense under Section 4(f)(1) as well. *See* OWBPA, Pub. L. No. 101-433, § 103. The inference of congressional approval is confirmed by the statements of the House Managers of the final bill, which explained that reversing *Betts* was "consistent with the allocation of burdens of proof with respect to other affirmative defenses under

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(emphasis added). Notably, when Congress amended Section 4(f)(2) to clarify its intent that the employer bear the burden of proof under that provision as well, it added the missing "otherwise prohibited" language. *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 978, 978 (1990).

In addition, the Court based its decision in *Betts* in part on its recognition of the special status long afforded retirement plans and their accepted use of age as a factor in establishing benefits. *See* 492 U.S. at 177-82. That consideration has no relevance under the general catch-all RFOA defense.

the ADEA." 136 Cong. Rec. H8618, *reprinted in* 1 *Legislative History of the Older Workers Benefit Protection Act* 23 (1991). The legislative history in the Senate likewise reflects Congress's intent to leave the then-current construction of the other ADEA defenses, including the RFOA defense, unaltered. *See* 136 Cong. Rec. S13596 (1990) (sponsors' explanation that the bill was "not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law").[29]

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[29] An earlier version of the Senate bill would have expressly codified the EEOC's position that the employer bears the burden of proof under each of the Section 4(f)(1) defenses. S. 1511, 101st Cong. (1990), *reprinted in* 1 *Legislative History of the Older Workers Benefit Protection Act* 394, 400. The Senate Report for that version of the bill expressly "endorse[d] the position of the EEOC that the 'reasonable factors other than age' exception included in Section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (*See* 29 C.F.R. § 1625.7), and express[ed] approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception." S. Rep. No. 101-263, at 30, *reprinted in* 1990 U.S.S.C.A.N. 1509, 1535. While the final version of the bill deleted the references to the burden of proof with respect to the defenses in Section 4(f)(1), that is no reason to conclude that the Senate disagreed with the EEOC's position. To the contrary, the sponsors of the amendment explained that "[t]his bill overturns the Supreme Court's allocation of the burden of proof under paragraph 4(f)(2). Because the allocation of the burden of proof under paragraph 4(f)(1) was not at issue in *Betts*, the managers find no need to address it in this bill." 136 Cong. Rec. S13596.

III. Nothing In *City Of Jackson* or *Wards Cove* Supports Treating The RFOA Provision As An Element Of The Plaintiff's Case In Chief.

The court of appeals recognized that there was "some force" to the argument that the text and structure of the RFOA provision marked it as an affirmative defense. Pet. App. 13a-14a. The court nonetheless decided that the "best reading of the text of the ADEA – in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable." Pet. App. 11a. In particular, the Second Circuit understood *City of Jackson* as "substituting the 'reasonableness' test" of the RFOA provision "for the 'business necessity' test" of *Wards Cove*. Pet. App. 11a-12a. The court then concluded that because the plaintiffs bore the burden of proof on the "business necessity" question, it stood to reason that they should also bear the burden of persuasion with respect to its substitute, the RFOA defense. *Id.*

This conclusion is flawed both at its premise and its conclusion: *City of Jackson* did not make the presumed substitution, and even if it had, that would not justify disregarding the plain text and structure of the statute which clearly establishes the RFOA provision as an affirmative defense.

A. *City of Jackson* Did Not Substitute The "Reasonableness" Test Of The RFOA Provision For The "Business Necessity" Test Of *Wards Cove*.

As the court of appeals seemingly acknowledged, Pet. App. 11a-12a, nothing in *City of Jackson* directly addressed the allocation of burdens of proof under the RFOA provision. That is unsurprising. The burden of proof was unimportant in that case as it was "clear from the record that the [employer's] plan was based on reasonable factors other than age." 544 U.S. at 241.

Nor does anything in *City of Jackson's* rationale justify the Second Circuit's holding. While the Court did observe that *Wards Cove* governs the common language of Title VII and the ADEA, 544 U.S. at 240, that common language does not include the RFOA provision. Accordingly, the Court's references to *Wards Cove* say nothing about the proper interpretation of the RFOA provision.

Certainly nothing in the Court's opinion endorsed modification of the *Wards Cove* test to integrate considerations of reasonableness into its analysis in age discrimination cases. To the contrary, the decision explained that the RFOA provision comes into play only *after* the defendant's conduct is found to be otherwise unlawful under the traditional *Wards Cove* analysis. That is, the Court observed that the RFOA provision applies only to "action otherwise prohibited" by the ADEA's general prohibitions. 544 U.S. at 238 (plurality opinion) (quoting 29 U.S.C. § 623(f)); *id.* at 246 (Scalia, J., concurring in part and concurring in the judgment) (same). And the Court further explained that whether an employment

practice is "otherwise prohibited" because of its unlawful disparate impact is determined on the basis of "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language . . . ." *Id.* at 240.

Consequently, as Judge Pooler properly decided, under *City of Jackson* the plaintiffs continue to bear the burden of proof on all the elements of the *Wards Cove* analysis, including on the question of "business justification." If the plaintiffs sustain that burden, they will have established that the employer's practices are "otherwise prohibited" by Section 4(a)(2) of the ADEA and, therefore, potentially subject to an RFOA defense under Section 4(f)(1). It is only at this point that the employer takes on the burden of proving that its otherwise unlawful conduct falls within the RFOA exemption from liability.

For that reason, the Second Circuit was wrong in thinking that its interpretation was necessary to avoid "compromis[ing] the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the "'legitimacy' of its business justification." Pet. App. 12a. Placing the burden of proof on the RFOA defense upon the employer will not relieve plaintiffs of any of the burdens they otherwise must bear under "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language." *City of Jackson*, 544 U.S. at 240.[30]

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[30] Petitioners recognize that there may be some ambiguity as to how much of the *Wards Cove* analysis is based on the language shared by the ADEA and Title VII and, accordingly, how much of the *Wards Cove* three-step analysis plaintiffs must satisfy before the burden shifts to the employer to establish its RFOA defense. Petitioners and Judge Pooler in her dissent below have taken the view that the plaintiffs must satisfy the

For the same reason, there is no question that under petitioners' view the "scope of disparate-impact liability under ADEA is narrower than under Title VII." *City of Jackson*, 544 U.S. at 240; *see* Pet. App. 12a-13a. Employers continue to prevail in every case in which the plaintiffs fail to sustain their burden under *Wards Cove*, and *in addition*, may avoid liability they would otherwise face under Title VII if they can meet the modest burden of establishing that their business practices are reasonable.

Thus, there is nothing incongruous about placing the burden of disproving business necessity on the plaintiff, while placing the burden of proving reasonableness on the employer. Because the defense only comes into play when the employer's practice has been shown by the plaintiff to have an *unnecessary* disparate impact – a showing that would be sufficient to establish liability under Title VII – it is entirely appropriate for Congress to place the burden to avoid liability on the defendant.[31] An

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entirety of the *Wards Cove* test before the burden shifts to the employer to establish the reasonableness of its practice. On the other hand, the EEOC has taken the position that the RFOA comes into play once the plaintiff has established that a specific employment practice has a significant adverse effect on older workers. *See* U.S. Invitation Br. 7. Because the Second Circuit held that petitioners satisfied their burden under the full *Wards Cove* analysis, see Pet. App. 54a-63a, the different views have no practical consequence in this case.

[31] The court of appeals objected that this construction of the statute added unnecessary complexity to ADEA adjudications. Pet. App. 10a-11a n.5. But nothing prevents an employer from pretermitting the full analysis by establishing at the outset that it has a reasonable basis for the challenged employment practice. *See, e.g.*, *City of Jackson*, 544 U.S. at 241-43 (resolving case on RFOA defense without first fully analyzing whether

employment practice that unnecessarily harms protected workers, and which the employer cannot show to be even "reasonable," is one that Congress surely intended to prohibit under the ADEA.

B. Even If The Court Were To Modify The *Wards Cove* Analysis To Incorporate The RFOA Provision, The Text, Structure, And Purpose Of The ADEA Still Require Placing The Burden Of Proof On The Employer.

Even if the Court were to modify the *Wards Cove* analysis to incorporate the RFOA defense, the employer should still bear the burden of persuading the jury of the reasonableness of its practices.

The Court's authority to develop a burden-shifting framework does not extend so far as to permit the Court to disregard the plain indications in the text and structure of the statute that Congress intended the RFOA provision to operate as an affirmative defense and for the employer to bear the burden of providing the reasonableness of its "otherwise prohibited" conduct. When this Court developed the concept of "business necessity" in *Griggs*, it was construing Title VII, which has no analog to the ADEA's RFOA provision. Thus, while *Wards Cove* may govern the "interpretation of Title VII's identical language," *City of Jackson*, 544 U.S. at 240, it does not govern, much less trump, the plain and unique language of the ADEA's RFOA provision.

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practice was "otherwise prohibited"); *cf. Price Waterhouse*, 490 U.S. at 247 n.12 (rejecting similar criticism in related context).

Accordingly, if the Court is to adopt a new consolidated burden-shifting scheme, it should adopt the one advanced by the EEOC: the RFOA "comes into play only after the plaintiff has established a significant adverse effect on older workers, and permits the defendant to escape liability only if it can persuade the factfinder that its actions were justified or excusable." U.S. Cert. Br. 7. Under that view, employees continue to bear the burden of proof under the first step of the *Wards Cove* analysis, but once the plaintiffs establish a disparate impact, the employer bears the burden of persuasion on the RFOA affirmative defense. *Id.*

While the employer may be assigned the burden of proof at a somewhat earlier stage in this analysis, it still enjoys significant advantages over a Title VII defendant: under *Wards Cove*, if a Title VII plaintiff can identify another equally effective alternative with less disparate impact, the employer is automatically held liable. 490 U.S. at 660-61. But under the ADEA, the employer can escape liability in all cases by making the modest showing that its actions were reasonable, even if the plaintiffs can identify numerous other reasonable alternatives with less disparate impact. *See City of Jackson*, 544 U.S. at 243.

The EEOC's construction of the statute thus reasonably accommodates both the need to give like meaning to the common language of Title VII and the ADEA, while at the same time respecting Congress's determination to make the reasonableness of an

employers' conduct an affirmative defense under the ADEA's unique RFOA provision.[32]

IV. Because The RFOA Provision Creates An Affirmative Defense, The Court Should Reverse The Judgment Below.

Because the court of appeals applied the wrong standard of proof, its evaluation of the sufficiency of the evidence to sustain the jury's verdict cannot stand. Furthermore, because the Court denied certiorari on the second question presented by the petition – which challenged the court of appeal's application of the RFOA defense to the facts of this case, *see* Pet. i; 128 S. Ct. 1118 (2008) (mem.) – there is no occasion for this Court to undertake the fact-intensive reasonableness inquiry under the proper standards of proof in the first instance. Accordingly, petitioners do not address the evidence regarding the reasonableness of respondents' practices in this brief.

Under the Court's normal practice, the judgment below would be vacated and the case remanded to the Second Circuit for proceedings consistent with the Court's resolution of the burden of proof question. However, a remand is not required in this case because it is not necessary for *any* court to undertake the factually complex reasonableness inquiry here. As Judge Pooler rightly found, respondents have

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[32] Were this Court to disagree, it should adopt the view of the statute advanced by Judge Pooler and hold that the employer bears the burden of proving the reasonableness of its conduct, but only after the plaintiffs have satisfied their burdens under the entirety of the *Wards Cove* analysis. *See supra*, Section III(A).

forfeited any right to assert the RFOA provision as an affirmative defense. Pet. App. 31a-32a.

While respondents did plead the RFOA provision in their answer, by the time of trial they had abandoned all reliance upon it. They did not ask for a jury instruction on the RFOA defense; did not object when one was not given; did not complain when the jury was instructed it should rule for petitioners if the petitioners sustained their burden of proof under *Wards Cove*; and did not object to the special verdict form which did not require the jury to consider the RFOA defense or the reasonableness of respondents' practices. *See* Tr. 4437-53 (jury charge conference); Tr. 4453-58 (conference on special verdict form); Tr. 4711-41 (jury charge); J.A. 73-74 (special verdict form).[33]

Under such circumstances, the Court should deem the defense abandoned. *See, e.g., Sales v. Grant*, 224 F.3d 293, 296 (4th Cir. 2000); *Violette v.*

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[33] Respondents did request, and the court did give, an instruction informing the jury that in deciding whether petitioners had established a prima facie case under *Wards Cove*, it was required to determine "whether any statistical deviations you find have been proven were caused by the ages of the plaintiffs, or, on the other hand, by some factors unrelated to the plaintiffs' ages." Tr. 4734. Petitioners argued on remand from this Court that in light of this instruction, the jury's finding that petitioners had established a prima facie case necessarily meant that it had rejected any suggestion that the disparate impact was based on any factor other than age (let alone a reasonable one). Petrs. Remand Reply Br. 4-5. For that reason, we referred to the charge given as an "RFOA charge." *Id.* at 4. However, that nomenclature should not obscure the fact that the charge was not meant to, and did not, embody the defense set forth in Section 4(f)(1), as it plainly did not put before the jury the critical question of reasonableness.

Smith & Nephew Dyonics, Inc., 62 F.3d 8, 10-11 (1st Cir. 1995). While a defendant has no obligation to press an issue upon which the plaintiff bears the burden of proof – and therefore, the Second Circuit may have been justified in reviewing the evidence of reasonableness in light of its holding that petitioners bore the burden of proof – a defendant is not entitled to challenge a jury verdict based on an *affirmative defense* that it never asked the jury to consider.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed or, in the alternative, vacated and remanded for further proceedings.

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APPENDIX

APPENDIX A

AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act, 29 U.S.C. § 623, provides in relevant part:

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the

laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee

benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

APPENDIX B

EQUAL PAY ACT

The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer

having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

APPENDIX C

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII, 42 U.S.C § 2000e-2, provides in relevant part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.* * * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful

employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.* * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment

practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29. * * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate

that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to

demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

APPENDIX D

DEPARTMENT OF LABOR
AGE DISCRIMINATION IN EMPLOYMENT ACT
REGULATIONS

29 C.F.R. § 860.102 (1968) provided in relevant part:

(a) Section 4(f)(1) of the [Age Discrimination in Employment] Act provides that "it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *"

(b) Whether occupational qualifications will be deemed to be "bona fide" and "reasonably necessary to the normal operation of the particular business", will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

29 C.F.R. § 860.103 (1968), provided in relevant part:

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentation is based on reasonable factors other than age; * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general

or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age.

(1) (i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: Provided, however. That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job

situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, where as another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do no have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose,

necessarily rests on the assumption that the age factor alone may be used to justify a differentiation -- an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

APPENDIX E

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AGE DISCRIMINATION IN EMPLOYMENT ACT REGULATIONS

29 C.F.R. § 1625.7 provides in relevant part:

> (e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(10)

No. 06-1505 4-11-08

IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM, *et al.*,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, once an employer has articulated a non-age basis for its employment decision in a disparate-impact case under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, the employee bears the burden of persuading the finder of fact that the proffered basis was unreasonable.

2. Whether the judgment below should be affirmed regardless of who bears the burden.

CORPORATE DISCLOSURE STATEMENT

Respondent KAPL, Inc. is a wholly-owned subsidiary of Lockheed Martin Corporation, a publicly-held company. KAPL, Inc., operates the Knolls Atomic Power Laboratory, a facility owned by the United States government.

Respondent Lockheed Martin Corporation is a publicly-held company. State Street Bank and Trust Company, acting in various fiduciary capacities and as trustee, owns 18.6% of Lockheed Martin Corporation's common stock, as reported on a Schedule 13G filed with the SEC. State Street Bank and Trust Company is a wholly-owned subsidiary of State Street Corporation.

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STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions, 29 U.S.C. § 623 (Age Discrimination in Employment Act), 42 U.S.C. § 2000e-2 (Title VII), 29 U.S.C. § 206(d) (Equal Pay Act), 29 C.F.R. § 1625.7(d)-(e) (current and proposed EEOC rules), are reproduced as an appendix to this brief.

STATEMENT

The Age Discrimination in Employment Act ("ADEA") provides that employers may not "limit, segregate, or classify" employees in a way that disadvantages an employee "because of ... age." 29 U.S.C. § 623(a)(2). It also provides that an employer does not violate the ADEA "where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1). In *Smith* v. *City of Jackson*, 544 U.S. 228, 240-41 (2005), the Court explained that this "RFOA" clause narrows the scope of disparate-impact liability under the ADEA, "consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." For this reason, "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.* at 241.

The Second Circuit recognized that this is just such a case, holding that petitioners' terminations were based on reasonable factors other than age. Pet. App. 19a. As we explain below, in reaching that conclusion, the Second Circuit properly held that petitioners had the burden of persuasion on that issue. In addition, as in *Smith*, respondents are entitled to judgment as a matter of law regardless of which party should bear the

burden, because the employment practice here was clearly based on reasonable factors other than age.

1. Pursuant to a contract with the Department of Energy ("DOE"), KAPL, Inc. operates the Knolls Atomic Power Laboratory, a federally-owned nuclear research and development facility. KAPL employees work on critical and sensitive projects for the DOE and the United States' Naval Reactors program ("Naval Reactors") involving the development of advanced nuclear-powered propulsion systems for submarines and surface ships, training of Navy personnel who operate those systems, and oversight of those systems' maintenance, repair, refueling, and decommissioning. Pet. App. 37a; Tr. 392-93.

DOE and Naval Reactors fund KAPL's operations and set annual staffing limits for the laboratory. Pet. App. 5a. In the early 1990s, responding to changing priorities occasioned by the end of the Cold War, Naval Reactors instituted numerous changes affecting KAPL. Tr. 4359-60. It terminated certain projects and scaled back others, and it imposed more stringent staffing limits. Tr. 416-17, 583-84, 4359-62; J.A. 125-27. For fiscal year 1996, Naval Reactors required KAPL to reduce its workforce by 108 people. Tr. 327-29; Pet. App. 38a.

At the same time, Naval Reactors assigned KAPL substantial new work, much of which involved cutting-edge technology. Tr. 416-17, 425-26, 433-36, 4362-63; J.A. 126-27. For example, Naval Reactors required KAPL to deliver a new class of advanced nuclear submarines by 2004. Tr. 425-26, 3106-07, 3111-20. The new work included structural analysis of new nuclear reactor components, solid-state physics in semi-conductor materials, software development and programming, computer-based electrical engineering, and digital sig-

nal-based processing technology. Tr. 425-26, 433-34, 3113-19.

Because KAPL's existing workforce lacked sufficient expertise and depth to perform some of this new work, KAPL determined that it needed to hire thirty-five new employees, even after reassigning existing workers. Tr. 313-14, 425-26, 433-36, 469-70, 1356, 3112-21; Pet. App. 5a. Thus, to comply with the Naval Reactors-mandated workforce reductions for fiscal year 1996, KAPL needed to reduce its *existing* workforce by 143 people. Pet. App. 38a.

Previously, KAPL had relied on attrition to reduce its workforce. Tr. 424-25, 583-84. As Naval Reactors terminated and scaled back programs, KAPL attempted to fill open positions with existing employees and limited outside hiring to people with skills critical to the laboratory's work. Tr. 424-25, 429, 431, 512, 1345-46, 3113-15. It also offered early retirement incentives. Tr. 584. These measures proved insufficient to achieve the mandated staffing reduction. Tr. 438, 584-85, 873-74, 1279.

Accordingly, under the DOE's direction and oversight, KAPL developed a comprehensive Workforce Adjustment Plan ("Work Plan"). Tr. 687-88, 873-74, 1279, 1338, 1344-48; C.A. Exhibit Vol. ("E.V.") E214-E240. One element of the Work Plan was a Voluntary Separation Plan, under which non-critical employees with at least twenty years of service were offered $20,000 to terminate their employment voluntarily. Tr. 1345; Pet. App. 38a; E.V. E219. Other elements included reassigning employees to fill open positions and retraining others in skills the laboratory needed going forward. Pet. App. 38a.

The Work Plan also provided that selected layoffs would occur as needed in areas where staffing could not be reduced sufficiently through retraining, skill shifts, or voluntary separations. E.V. E217. When designing this element of the plan, KAPL managers evaluated the practices of other employers that had performed similar layoffs, including IBM, GE, Pepsi-Cola, Ford, Oak Ridge, and Martin Marietta. Tr. 340, 883-86, 1135, 1337, 1347-48, 1402-03, 4089. These companies' best practices guided the development of KAPL's involuntary reduction in force ("RIF") procedures. *Id.* In October 1995, the DOE approved the Work Plan, including the four criteria to be used in the event of a RIF. Tr. 1345-46; E.V. E219.

2. Because the Work Plan's voluntary elements proved insufficient to meet Naval Reactors' staffing limitations, KAPL concluded that a RIF was necessary. Pet. App. 38a-39a. For laboratory sections operating above their staffing allowances, KAPL identified a list of "excess skills." Pet. App. 39a; Tr. 639-40, 872-73, 907-12. This analysis was designed to identify positions that KAPL could eliminate with the least adverse effect on operations. Pet. App. 73a; Tr. 907-10, 1416-17.

After the excess skills were identified, employees with those skills were evaluated by their managers for termination through the RIF process. Pet. App. 73a. Employees were grouped at the section, subsection, or unit level and placed on matrices designed for the RIF. Tr. 795-96, 983-84, 1416-17; Pet. App. 74a; J.A. 99-105. In all, KAPL managers produced twenty-nine matrices, together containing a total of 245 employees. Pet. App. 6a; Tr. 352, 1291.

Each manager completing a matrix gave employees a score from zero to ten (ten being highest) on four

equally-weighted criteria. J.A. 95-103; Pet. App. 39a. First, managers assigned performance scores, calculated by averaging the ratings from the employee's prior two performance appraisals. J.A. 94, 102; Pet. App. 39a.

Second, employees were ranked on their "criticality." J.A. 95, 99. This measured how essential an employee's skills were to the existing and future work of the laboratory. Tr. 1023-24, 1134-35, 1404-05. Written guidelines for the RIF explained that criticality measured such things as: "How critical are the employee's skills to continuing work in the Lab? Is the individual's skill a *key* technical resource for the [] program? Is the skill readily accessible within the Lab or generally available from the external market?" J.A. 95. The guidelines instructed managers to ask such questions as: "Is this employee the sole owner, or one of few, who possess key technical knowledge for the [] program? Is this skill readily accessible in the Lab? Would this skill have to be replaced?" J.A. 102-03. Criticality was particularly important given the changing nature of KAPL's work. Tr. 1023, 1134-35. A particular employee might have a general job description fitting the definition of an excess skill, yet be the *only* employee possessing expertise essential to completion of ongoing tasks required by Naval Reactors. Tr. 984, 1023, 1134-35. By contrast, another employee with the same job description might have knowledge relevant primarily to projects Naval Reactors had terminated or scaled back. Tr. 2727-28, 2753-57, 3032-43, 3180-90, 3211-13, 3326-27.

Third, employees with excess skills were ranked on their "flexibility." J.A. 95, 99. This was a measure of whether the employee possessed—or could readily acquire—skills that might be applied in areas of the labo-

ratory other than the employee's current job. Tr. 1023-24, 1403-04. The written RIF guidelines instructed managers to rate employees on such issues as: "Can his or her documented skills be used in other assignments that will add value to current or future Lab work? Is the employee retrainable for other Lab assignments?" J.A. 95. Managers also were to consider "how adaptable [their employees] are to other work," whether they had "[s]kills beyond those needed in current position," and whether they "exhibit[] willingness to assist other functions/areas within the Lab." J.A. 121. Given Naval Reactors' changing demands, flexibility was important. As KAPL President John Freeh explained in a speech predating the RIF, "As we and the Program decide to stop work in one area and start different work in another area, the nature of the work and the required skills can change significantly.... This means we need people who can make this kind of transition. People who are versatile and motivated to retrain and work in unfamiliar areas[.]" J.A. 126-27.

Fourth, employees were rated on their years of company service. J.A. 95, 102. Managers gave employees between zero points (for less than two years of service) and ten points (for more than twenty years). *Id.*; Pet. App. 40a. Thus, ten of the forty points available in the RIF analysis were based on the employee's tenure at the company. J.A. 95, 102.

Employees' scores for the four criteria were added together. The employees with the lowest rankings on each matrix were identified for layoff. J.A. 96; Pet. App. 6a. In order to minimize the number of terminations, however, managers were instructed to recommend any open positions in the laboratory that the employees might be suited to fill. J.A. 96; Pet. App. 74a.

The four criteria KAPL used in its RIF have been employed by many other companies that have undertaken similar downsizings. Tr. 4092-94, 4102-03. And KAPL took several steps to ensure the consistency and accuracy of its managers' RIF decisions. Tr. 1409-10.

First, KAPL managers—who possessed unique knowledge concerning the needs of their sections and the capabilities of their employees—received extensive training on the entire RIF process. J.A. 117-122; Tr. 984-85, 1027, 1111, 1410-1415, 4090-91, 4100; Pet. App. 16a. All participating managers were required to attend Manager Information Sessions on the RIF procedures and standards. J.A. 117-22; Tr. 1003-04, 1413-15. The training sessions explained in detail how managers were to apply each of the RIF criteria, including flexibility and criticality. J.A. 119, 121; Tr. 1003-04, 1023, 1414-15, 2732-33. KAPL also supplied managers with a comprehensive written guide to the RIF process that provided definitions of the four criteria and explanations of how they should be applied. J.A. 94-116; Tr. 1002-04, 1023.

Second, KAPL required managers making RIF determinations to defend their decisions to a Review Board made up of senior managers. Managers participating in the RIF were required to provide overviews of their sections' structures (including areas of excess skills and open positions), to justify why they included certain employees on their matrices or excluded others, and to defend the scores they gave, including on criticality and flexibility. J.A. 97, 115-16, 122-23; Tr. 487-88, 832-33, 1008-09, 1024, 1111, 1135, 1293, 1410, 1459-60, 2825, 3197, 3374-75, 3715-17.

The Review Board closely scrutinized managers' determinations to ensure that their analyses of excess

skills and applications of the RIF criteria were consistent and accurate. Tr. 487-88, 544-45, 832-33, 1009, 1410, 3481-82, 3715. It reviewed each completed matrix, relying on detailed interviews with managers and reviews of employee personnel files. Tr. 1009, 1113-14, 3716-17, 3720-21. It focused particular attention on the flexibility and criticality ratings. Tr. 1024, 1113-14, 3375, 3716-17. The Review Board instructed some managers to revise their matrices and required them to return for follow-up review sessions. Tr. 1410, 3197-98, 3670-72, 3716-19, 4127. It challenged managers' determinations of which employees had excess skills, and in several cases ordered managers to add employees to their matrices. *Id.*; Tr. 3374-75, 4138.

After the Review Board approved a list of employees for the RIF, KAPL's President continued to seek ways to avoid terminating those employees. Tr. 1411, 4378-81. He held a meeting two days before the RIF to confirm personally that none of the employees was a suitable match for any open position. *Id.* He questioned the managers of employees selected in the RIF and other managers who had open positions, requiring the group to discuss each employee individually. Tr. 4379-80. Ultimately, KAPL's President and the managers concluded that there were no suitable matches. Tr. 4378-79.

Some of the terminated employees scored low on criticality because they had been assigned to projects that Naval Reactors had already terminated or scaled back, and so they had few skills that were critical to the ongoing or future work at the laboratory. Tr. 512-14, 2727-28, 2753-57, 3180-90, 3211-13, 3326-27. Employees in sections where work had dwindled tended to be older because KAPL had not hired anyone to perform those obsolete tasks in years (and sometimes, in more than a

decade). Tr. 512-14. Likewise, a number of the terminated employees scored low on either criticality or flexibility (or both) because they had demonstrated an unwillingness to take on new tasks or learn new skills even though their managers had requested that they do so. Tr. 1621-22, 1831-35, 2087-88, 2098, 2104-05, 2110-13, 3187-90, 3211-13.

For example, Arthur Kaszubski, a manager of transportation and warehouse activities, ignored the recommendations of two different managers who told him he should become computer literate. Tr. 1603, 1621-22. Similarly, William Chabot, a procurement department employee, acknowledged that, even though his manager had told him a layoff was coming and had urged him to develop expertise in regulations concerning foreign-owned or controlled businesses, he failed to develop that expertise. Tr. 1831-35. Chabot also admitted that he was incapable of performing the job duties of the only other employee against whom he was compared on a RIF matrix, and that the other employee was capable of performing all of Chabot's duties. Tr. 1835-37, 1839-40, 1857. And William Reynheer, a test sponsor in the materials-development operation, conceded that he did not have materials-engineering skills and was not computer literate, although both were critical skills in his subsection, and that even though his managers had explained in his performance evaluations that he needed to develop those skills, he had failed to do so. Tr. 2087-88, 2098, 2104-05, 2110-13, 3187-90.

3. Near the end of the RIF process, a KAPL human resources representative performed an assessment to determine whether the RIF would have an adverse age impact. Pet. App. 40a-41a. This analysis was flawed because the representative merely compared

the average age of KAPL's exempt workforce before and after the RIF. Tr. 1895-96. Because that workforce exceeded 2,000 workers, this analysis did not show the RIF's impact on older employees. *Id.*; Pet. App. 17a.

This error was of no consequence, however, because KAPL soon recognized that most of the employees identified for termination were over forty. Tr. 825, 1285, 1287, 1421-22, 1425-27. In fact, KAPL's general counsel and other managers expressed concern that KAPL might face an age discrimination lawsuit if KAPL went forward with the RIF. Tr. 1423, 1425-27, 1587. The general counsel carefully considered this possibility in an independent review of the RIF process: he analyzed the matrices to ensure that they included the correct employees based on the definitions of excess skills; he reviewed employees' personnel folders to ensure that their performance ratings were accurate; and he spoke with some of the employees' managers and with human resources representatives to confirm that there were legitimate, non-discriminatory reasons for the selections. Tr. 1286-89, 1290-91, 1300, 1406-07, 1415-19, 1423. He also sought to determine whether criticality and flexibility were applied in a consistent way across matrices. Tr. 1405-07. Together with several managers, KAPL's general counsel concluded that the determinations had been properly made, were based on reasonable non-age factors, and did not violate the ADEA. Tr. 1289, 1419-27.

The general counsel also determined that any effort to ameliorate further the RIF's impact on older workers by selecting younger workers for termination instead would have placed KAPL in an untenable legal position. The New York Human Rights Law prohibits age discrimination against any employee eighteen

years of age or older. Tr. 1423-27. Thus, if KAPL had purposefully selected employees under forty for termination to avoid an ADEA suit, it might have faced a lawsuit under state law contending that KAPL had intentionally discriminated against those younger employees because of their ages. Tr. 1425, 1427; *see also Deutsch* v. *Kroll Assocs., Inc.*, No. 02 Civ. 2892, 2003 WL 22203740 (S.D.N.Y. Sept. 23, 2003) (reverse-age-discrimination claim brought by younger worker). Accordingly, KAPL's general counsel recommended that the company proceed with what he determined were the fair and legitimate termination selections of KAPL's managers and Review Board. Tr. 1425-27. On December 6, 1995, KAPL informed thirty-one exempt employees that they would be terminated. Pet. App. 74a.

4. In January 1997, twenty-eight of the terminated employees sued, contending that they had been discriminated against because of their ages. They raised both disparate-treatment and disparate-impact claims. Pet. App. 43a.

In pressing their disparate-impact claims at trial, petitioners did not expressly identify any specific element of the RIF as constituting an unlawful employment practice. Instead, petitioners' claims were premised on the arguments that (i) the *entire RIF* had a disparate impact on older employees and, (ii) because KAPL could serve its business objectives without resorting to involuntary layoffs, the ADEA required KAPL to adopt an alternative to the RIF.[1] Tr. 4413,

[1] Respondents argued that petitioners' identification of the RIF as a whole was insufficient to satisfy the *Wards Cove* requirement that a plaintiff isolate and identify the specific employ-

4416-17, 4428-31, 4434-36, 4597, 4599-604, 4634-37; Mem. in Opp. to J.M.O.L., New Trial, or Remittitur, 11-13, 19-21 ("JMOL Opp."). Specifically, at step one of the framework drawn from *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), petitioners argued that the RIF *as a whole* had a statistical adverse impact on employees aged forty and older. Tr. 4428-29, 4597-99.

At step two, respondents rebutted petitioners' prima facie case by offering a facially legitimate business justification for the challenged practice. Pet. App. 59a. Respondents explained that the RIF was necessary to enable KAPL to comply with Naval Reactors-mandated staffing reductions, while at the same time ensuring that the laboratory's employees possessed those skills critical to the performance of KAPL's existing and future functions. Pet. App. 59a, 94a.

At the third step of the *Wards Cove* analysis, petitioners sought to demonstrate that there were alternatives to the RIF that would not have had an adverse impact on older workers, but that would have been equally effective in serving respondents' business goals. Tr. 4430-31, 4599-604, 4634-37; JMOL Opp. 20-21. Again, because the employment practice that petitioners challenged was the RIF itself, and not particular aspects of the RIF, petitioners did not claim at step three that KAPL should have designed the RIF more carefully. Tr. 4430-31. Rather, petitioners argued that, *instead of performing the RIF*, KAPL should have instituted a hiring freeze or expanded the scope of the Voluntary Separation Plan ("VSP"). *Id.*; Tr. 4600-04, 4634-37; Pet. App. 97a-98a. Respondents countered

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ment practices that are allegedly responsible for any observed statistical disparities. *See, e.g.*, Tr. 4413-14.

this argument by offering evidence that neither of these options would have been equally effective at meeting the business justifications KAPL offered at step two. Pet. App. 97a-98a; Tr. 429-37, 473-74, 537-41, 1399-1400, 2588, 3117-20; Post-Trial Mem. in Supp. of Mot. for J.M.O.L., New Trial, and/or Remittitur 22.

Respondents also presented evidence justifying their use of the RIF criteria. Tr. 4092-4104; Pet. App. 16a. Through the testimony of their expert Frank Landy, respondents demonstrated that the criteria KAPL used to select employees for termination were reasonable and typically employed in RIFs. Tr. 4093. Landy also testified that KAPL's training equipped managers well to apply the RIF criteria. Tr. 4090-91. Petitioners chose not to cross-examine Landy. Tr. 4116.

5. The jury found for respondents on all of the original plaintiffs' disparate-treatment claims under both mixed-motive and pretext theories. J.A. 62-64, 69-71. The jury thus determined that petitioners had failed to prove that age had been a motivating factor in their terminations. It found for petitioners, however, on their disparate-impact claims, applying instructions that set out the three steps of *Wards Cove*. Tr. 4731-36. On a special verdict form, the jury indicated that petitioners had made their prima facie statistical showing at *Wards Cove* step one; that respondents had not produced evidence of a business justification at step two; and—despite being told to skip the third step if they found the previous one not satisfied—that petitioners had proven an equally effective alternate practice at step three. J.A. 73-74.

6. Respondents moved for judgment as a matter of law, which the district court denied. At the first

Wards Cove step, the court recognized that petitioners were required to identify a specific employment practice that had an adverse impact on older employees. Pet. App. 83a. It concluded that the practice identified by petitioners—the implementation of the RIF itself—was not sufficiently specific, but nevertheless fell into an exception for decision-making processes that "are not capable of separation for analysis." Pet. App. 83a-85a (citation omitted). That was so, the court held, because even though three of the RIF criteria—performance, criticality, and flexibility—were reached through the application of "objective standards," petitioners' statistical evidence "sufficed to establish that no particular factor and no particular criterion caused the disparate impact on older employees." Pet. App. 84a-85a & n.26.

The court rejected the jury's finding at *Wards Cove*'s second step, and held that respondents *had* produced evidence of a business justification. Pet. App. 93a-95a. Nevertheless, it deemed the error harmless, because the jury had gone on to answer the third-step question, and, the court found, sufficient evidence supported the jury's conclusion: "[P]laintiffs offered evidence from which the jury could find that either of two alternative practices were available to defendants to achieve the same result without causing a disparate impact on older employees"—"institut[ing] a temporary hiring freeze" or "offer[ing] the VSP to a greater number of employees." Pet. App. 96a-97a.

7. The Second Circuit affirmed, but on a different basis from that adopted by the district court. Contrary to the district court's view, the Second Circuit held that the RIF itself was not a sufficiently specific employment practice to satisfy *Wards Cove*'s first step. Pet. App. 58a. Nevertheless, it relied on a single answer

given by petitioners' expert to conclude that "the jury could have found ... the degree of subjective decision making allowed in the [RIF] created the disparity"—even though petitioners themselves never made that argument to the jury (or indeed to the Second Circuit). Pet. App. 59a.

The court of appeals agreed with the district court that respondents had adduced evidence of a business justification—the need "to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions." *Id.* And it rejected the alternatives the district court thought adequate to satisfy petitioners' burden under *Wards Cove* step three—expanding the VSP or instituting a hiring freeze—because those were alternatives to the RIF itself, not to the specific employment practice of "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility.' " Pet. App. 60a. But the court nevertheless concluded that petitioners prevailed at step three, because, it believed, KAPL "did nothing to audit or validate the results," and "KAPL could have designed [a RIF] with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias." *Id.*

Respondents petitioned for certiorari, and this Court granted the petition, vacated the judgment, and remanded for further consideration in light of *Smith* v. *City of Jackson*, 544 U.S. 228 (2005). *See* 544 U.S. 957 (2005).

8. On remand, the Second Circuit concluded that its prior decision did not survive *Smith*, vacated the district court's judgment, and remanded with instructions to enter judgment for respondents. Pet. App. 5a.

It concluded that its prior analysis was "untenable" because in *Smith*

> the Supreme Court held that the "business necessity" test is not applicable in the ADEA context; rather, the appropriate test is for "reasonableness," such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals.

Pet. App. 9a. The court next determined that plaintiffs should bear the burden of persuading the fact-finder that the employer's justification is unreasonable. Pet. App. 11a. It observed that *Smith* made clear that the scope of liability under the ADEA is narrower than under Title VII, and that result is justified because " 'age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment' "; thus, " 'certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.' It would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable." Pet. App. 12a-13a (quoting *Smith*, 544 U.S. at 240-41).

Turning to the application of the post-*Smith* framework, the court found that respondents had satisfied their burden of production by adducing evidence "suggest[ing] that the specific features of the [RIF] challenged by plaintiffs were routinely-used components of personnel decisionmaking systems in general, and were appropriate to the circumstances that provoked KAPL's [RIF]." Pet. App. 16a. The court then

examined whether petitioners satisfied their burden of demonstrating that this justification was unreasonable. Cautioning that a court is "not a super-personnel department," *id.* (citation omitted), it reviewed the evidence regarding the planning, conduct, and review of the RIF, and concluded that the process involved "substantial" measures that "restricted arbitrary decision-making by individual managers." Pet. App. 19a. Overall, the court concluded that, while other reasonable means could have been employed, " 'the one selected was not unreasonable.' " *Id.* (quoting *Smith*, 544 U.S. at 243).

Judge Pooler dissented. In her view, the three steps of *Wards Cove* remain unchanged after *Smith*, and RFOA constitutes a separate, affirmative defense on which employers have the burden of proof, Pet. App. 24a-25a—an argument petitioners never pressed.

SUMMARY OF ARGUMENT

This case concerns the appropriate test for establishing age discrimination under a disparate-impact theory. In the wake of *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), the Second Circuit applied a modified *Wards Cove* burden-shifting framework under which a "reasonableness" test replaces "business necessity." Thus, after the plaintiff makes a prima facie showing of a statistical age impact, and the employer responds with a non-age basis for its action, the plaintiff must prove that the proffered justification was unreasonable. By doing so, the plaintiff proves that the decision was indeed "because of ... age" and not based on "reasonable factors other than age." 29 U.S.C. §§ 623(a)(2), (f)(1).

This test gives proper effect to two crucial differences between age and Title VII-protected characteristics that this Court identified in *Smith*. Age frequently correlates negatively with capacities on which an employer may legitimately focus its decisionmaking, and historically has not been the subject of invidious discrimination. Accordingly, a statistical adverse impact has less probative value in age cases than under Title VII—it simply is less likely to have resulted from discrimination. To make up for that lesser probative value, the remainder of the plaintiff's case must prove more than would be sufficient to make out Title VII discrimination. Assigning plaintiffs the task of proving unreasonableness does just that.

The differing approaches proposed by petitioners and the government each suffer from serious flaws. Petitioners would require the parties, the jury, and the court to navigate a convoluted, four-step inquiry that disregards the need to modify the *Wards Cove* ap-

proach to take account of the fact that age is different from the categories under Title VII. The government recognizes that petitioners' approach is incorrect, but its own requires even less of a plaintiff, demanding nothing beyond the prima facie case. Both insist that RFOA is available as an affirmative defense that the defendant must separately prove, but this cannot solve the inadequacy of their accounts of the plaintiff's case-in-chief.

Petitioners argue that their result is nevertheless compelled by the text and structure of the ADEA, by an EEOC interpretive rule, and by parallels to other statutes. None of these arguments has merit. Petitioners' overly mechanical reading of the statute is at odds with the functional approach this Court took in deciding that another part of Section 623(f) was *not* an affirmative defense. Their textual argument fails to give effect to every word in the statute, and the text of the EEOC rule on which they rely is inconsistent with their position. In addition, their attempts to analogize to other provisions in the ADEA and in the Equal Pay Act fail to appreciate the very different functions those provisions play within their respective statutes, and their reliance on post-enactment legislative history is *ipso facto* unconvincing.

This Court should therefore hold that plaintiffs bear the burden of persuasion on RFOA. But even if it does not, the Court should affirm the judgment of the Second Circuit, because respondents produced substantial and unrebutted evidence that the factors on which they based their decision were reasonable. In that way, this case is just like *Smith*, in which this Court affirmed summary judgment on the ground that the non-age factors considered by the employer were reasonable as a matter of law.

ARGUMENT

I. Disparate Impact Plaintiffs Bear The Burden Of Persuading The Jury That The Factors Forming The Basis Of An Employment Decision Were Unreasonable

A. Placing The Burden Of Persuasion On Plaintiffs Is The Only Workable Approach

Three proposed tests for ADEA disparate-impact claims are before this Court. Petitioners advocate applying the *Wards Cove* business-necessity test, and requiring in addition that employers prove RFOA as a separate affirmative defense. The government argues that reasonableness has replaced business necessity, but asserts that a plaintiff's case consists merely of offering statistics showing an impact on older workers. Neither proposal properly accounts for the limited probative value of a statistical age impact. Only the Second Circuit's approach—requiring plaintiffs to prove that the factors on which a decision was based were unreasonable—does so.

1. A modified *Wards Cove* test in which reasonableness replaces business necessity gives proper effect to the RFOA provision and comports with *Smith*

As the Second Circuit explained, *Smith* made clear that "the 'business necessity' test is *not* applicable in the ADEA context." Pet. App. 9a (emphasis added). Rather, "the appropriate test is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals." *Id.* The Second Circuit incorporated this different standard into a three-step burden shifting framework akin to *Wards*

Cove: After plaintiffs isolate a specific employment practice and a statistically significant adverse impact resulting therefrom, the defendant must produce evidence of a justification for the challenged practice, and then the burden shifts back to the plaintiffs "to demonstrate that *that* justification is unreasonable." *Id.* at 15a.

The Second Circuit's recognition that the business-necessity test should not govern ADEA claims properly accounts for two fundamental ways in which age differs from Title VII's categories. First, "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." *Smith*, 544 U.S. at 240. Second, "intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII." *Id.* at 241; *see also Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

Given these differences, the permissible inferences to be drawn from a statistically significant adverse impact differ markedly between age and Title VII-protected characteristics. Race, religion, sex, and the other Title VII categories generally do not correlate with an individual's job-related capabilities. *See Smith*, 544 U.S. at 240; Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (June 1965), *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* (1981), Doc. No. 5, at 1 ("Wirtz Report") ("The Nation has faced the fact ... that people's ability and usefulness is unrelated to the facts of their race, or color, or religion,

or sex, or the geography of their birth.").[2] Accordingly, and in light of the long history of discrimination Title VII was enacted to combat, an employment practice that yields a statistically significant adverse impact on minorities or women is immediately suspect.

A practice that yields a statistical disparate impact on older workers, by contrast, is far less suspect. Age—unlike race, religion, and the other Title VII classifications—is often relevant to certain employment-related capabilities. *See Smith*, 544 U.S. at 240. Decisions that focus on such capabilities should be *expected* to correlate negatively with age. This Court has noted, for example, that "physical ability generally declines with age," *Massachusetts Bd. Of Ret.* v. *Murgia*, 427 U.S. 307, 315, (1976), and that "mental capacity sometimes diminish[es] with age," *Gregory* v. *Ashcroft*, 501 U.S. 452, 472 (1991). The Wirtz Report recognized that a class of cases exists in which "there is in fact a relationship between [an individual's] age and his ability to perform the job." Wirtz Report 2 (emphasis omitted). Moreover, "human capital depreciates[,] due not only to a literal wearing out, as by memory loss or diminished dexterity[,] but also to a changing work environment, which reduces the value of particular knowledge or skills." Richard A. Posner, *Aging and Old Age* 51-53 (1995).

An employment practice yielding a statistical adverse impact on older workers therefore warrants less suspicion, and accordingly a less exacting justification,

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[2] The Secretary of Labor prepared this report in response to Congress' request for a study of age discrimination in employment, and this Court considered it in construing provisions of the ADEA in *Smith*. *See* 544 U.S. at 232.

than one that has an adverse impact on a Title VII-protected characteristic. Reexamining the *Wards Cove* framework with that point in mind, two consequences emerge.

First, under *Wards Cove*, a prima facie showing of a statistical adverse impact on nonwhite workers was insufficient to establish that a particular employee had suffered a disadvantage "because of" race. *See* 490 U.S. at 660 ("The persuasion burden [regarding business necessity] ... must remain with the plaintiff, for it is he who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity." (quoting 42 U.S.C. § 2000e-2(a)). *A fortiori*, a statistically significant adverse impact on older workers cannot establish that a particular employee has suffered a disadvantage "because of" age.

Second, under *Wards Cove*, a plaintiff could show that a disadvantage was "because of" race by rebutting the defendant's business justification with evidence that another means would have achieved that same business result without an adverse impact. *See* 490 U.S. at 660-61. But because the probative value of the prima facie case in the age context is weaker, the remaining steps in the analysis must do more work than in a Title VII case. Thus, even though satisfying the remainder of the *Wards Cove* test is sufficient to confirm that a plaintiff suffered an employment disadvantage "because of" a trait protected under Title VII, it does not follow that satisfying that test is sufficient to carry the heavier burden needed to confirm that an older worker suffered a disadvantage "because of" age.

The Second Circuit's test properly takes account of these differences between age and the Title VII categories. It places a higher burden on plaintiffs by re-

quiring them to show that the challenged employment action was not just unnecessary, but unreasonable. In so doing, it responds to the lower probative value of a statistical adverse impact on older workers. And where a plaintiff rules out the proffered factors "other than age" as unreasonable, the plaintiff will have demonstrated that the employment disadvantage was "because of" age.

In sum, replacing business necessity in the *Wards Cove* framework with reasonableness produces a straightforward and intuitive test responsive to the unique features of age and consistent with *Smith*'s instruction, 544 U.S. at 240, that "the scope of disparate-impact liability under ADEA is narrower than under Title VII."

2. Petitioners' approach fails to account for the differences between age and traits protected by Title VII and involves an unnecessarily convoluted analysis

Petitioners argue that *Wards Cove*'s business-necessity test should be applied, unmodified, to establish disparate impact under the ADEA. RFOA, they maintain, is a separate and waivable affirmative defense that the employer must both plead and prove. Their proposal yields a convoluted test insensitive to the distinct nature of age in employment.

a. Petitioners' approach is insufficient to establish that a plaintiff suffered an adverse action "because of" age

There is no dispute that a plaintiff bears the ultimate burden of persuading the jury that the defendant's actions constituted "limit[ing], segregat[ing], or classify[ing]" employees in a way that disadvantaged

the plaintiff "*because of* ... age." 29 U.S.C. § 623(a)(2) (emphasis added). As explained above, the fact that an employment practice has a statistical adverse impact on older workers is much less probative than would be true of an adverse impact on employees of a certain race, religion, or other Title VII-protected category. Thus, an age-discrimination plaintiff who merely satisfies the three steps of an unmodified *Wards Cove* framework does not thereby establish adverse action "because of" age.

Petitioners make no effort to address this issue. They simply assert that satisfying *Wards Cove*'s three steps is sufficient to establish "unlawful" action under the ADEA, and claim that *Smith* so held. As petitioners tell it, this Court "explained that whether an employment practice is 'otherwise prohibited' because of its unlawful disparate impact is determined on the basis of '*Wards Cove*'s pre-1991 interpretation of Title VII's identical language.' " Pet. Br. 46-47 (quoting *Smith*, 544 U.S. at 240).

Petitioners misread *Smith*, which simply deemed "applicable to the ADEA" *Wards Cove*'s interpretation of Title VII's "identical language." 544 U.S. at 240. Moreover, the Court made that statement while explaining that the 1991 amendments that had "expanded the coverage of Title VII" did not apply to the ADEA. *Id.* The function of the pertinent amendments was to reassign the ultimate burden of persuasion to employers. *See* 42 U.S.C. § 2000e-2(k), *added by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074. Thus, the sentence in *Smith* on which petitioners rely so heavily does not support their argument. Rather, that sentence is properly understood as making clear that *Wards Cove*'s interpretation of "because of"—as requiring that "[t]he persuasion burden ... must remain

with the plaintiff," 490 U.S. at 660—remains applicable to the ADEA. After all, "because of" appears in both statutes, but "business necessity" does not.

Even if the "remains applicable" sentence in *Smith* might be read more broadly, moreover, it cannot be taken as far as petitioners claim. The existence of RFOA in the ADEA renders the pertinent portions of the two statutes non-identical, and petitioners cannot insist that RFOA has no bearing on the applicability of the business-necessity test without assuming their own conclusion.

b. Petitioners' proposal is unworkably complex and functionally at odds with RFOA

Petitioners' approach to disparate-impact cases under the ADEA would be needlessly complex. After applying the already complicated three-step burden-shifting framework of *Wards Cove*, the jury would then have to consider a fourth step that would ask whether the practice they had already found to be discriminatory nevertheless was based on non-age factors that were "reasonable." That framework would be very difficult for a jury to understand; as the Second Circuit observed, doing so would "introduc[e] a redundant (and counterintuitive) step in the analysis." Pet. App. 10a n.5. Indeed, the government agrees that the ADEA "provides no textual basis for asking *both* whether a challenged employment practice is supported by business justification *and* whether it is based on reasonable factors other than age." U.S. Br. 26.

Petitioners respond that "nothing prevents an employer from pretermitting the full analysis by establishing at the outset that it has a reasonable basis for the challenged employment practice," as this Court did in

Smith. Pet. Br. 48 n.31. Although that may be a suitable mode for appellate review, it is unclear how it could function in a set of jury instructions; and it is hardly a reassuring defense of the workability of a four-step analysis to say that steps two and three might be redundant of the fourth.

In addition, the government identifies a more fundamental incompatibility between RFOA and business necessity. A plaintiff who successfully navigates the third step of the business-necessity test "prove[s] that '[the employer was] using [its] tests merely as a "pretext" for discrimination.'" *Wards Cove*, 490 U.S. at 660 (citation omitted). And once a disparate impact plaintiff has "established that a challenged practice is a pretext for intentional age discrimination, it makes little sense then to ask whether the discriminatory practice is based on reasonable factors *other than age*." U.S. Br. 26.[3]

In sum, petitioners' proposed test is both analytically deficient and unworkable. It would apply a standard created for Title VII cases to the ADEA in disregard of the limited probative significance of a statistical age impact. And in relegating RFOA to an affirmative defense, it yields a four-step test that is at best cumbersome and counterintuitive, and at worst incoherent.

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[3] The government implies, moreover, that the effect of petitioners' interpretation would be to leave the RFOA provision with little function in the ADEA. *See* U.S. Br. 26. *Smith* established that impact claims are where the RFOA "plays its principal role." 544 U.S. at 238-39. If petitioners' view were correct, RFOA's "principal role" would be no role at all.

3. The approach suggested by the government relieves plaintiffs of the burden of proving discrimination

The government acknowledges that, after *Smith*, the business-necessity test is inapplicable to ADEA disparate-impact claims. *See* U.S. Br. 25-26. For such claims, "the RFOA defense replaces, rather than supplements, the business necessity test applicable in Title VII cases." *Id.* at 25.

Nevertheless, the government maintains that the employer should bear the burden of persuasion on RFOA. *See* U.S. Br. 10-25. But given its view that neither business necessity nor RFOA forms part of the plaintiff's case, the government must explain what a plaintiff needs to show to establish a violation of Section 623(a)(2). That explanation seems simply to be step one of *Wards Cove*: "plaintiffs [must] demonstrate[] that a specific employment practice has a significant disparate impact on older workers—that is, that the employer has 'limit[ed], segregat[ed], or classif[ied] his employees in [a] way which ... adversely affect[s an individual's] status as an employee, because of such individual's age.'" *Id.* at 26-27 (quoting § 623(a)(2)).

That cannot be correct. *Wards Cove* made clear that a Title VII plaintiff had not shown that the employer took some action "because of" a prohibited characteristic until the plaintiff carried the ultimate burden of persuasion—by rebutting the defendant's claimed business justification. *See* 490 U.S. at 660; *cf. Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988) (plurality opinion) ("statistical disparities must be sufficiently substantial that they raise ... an *inference* of causation" in the prima facie case (emphasis added)).

As demonstrated above, the same reasoning applies *a fortiori* to age.

The government's approach, moreover, is hard to square with the fact that "the scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith*, 544 U.S. at 240.[4] It would impose on a defendant a burden much greater than was borne under *Wards Cove*, as it adds to the burden of production the further burden to persuade the jury that the factors on which the decision was based were reasonable. Although reasonableness is a more favorable standard than business necessity, that is unlikely to make up for the disadvantage of the burden. *Cf. Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive[.]").

The Second Circuit's approach is the only one that accords with this Court's precedents and the statutory text. The tests proposed by petitioners and the government both fail to account for the differences between age and characteristics protected by Title VII, and petitioners' test has fatal practical flaws.

B. Petitioners' Remaining Arguments Cannot Overcome The Deficiencies In Their Approach

Rather than addressing the practical and analytical problems with their proposed test, petitioners argue that treating RFOA as an affirmative defense is compelled by the statutory structure and text, an EEOC

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[4] Because the Court identified RFOA and the 1991 amendments to Title VII as *separate* reasons for ADEA's narrower scope, ADEA liability must be narrower than Title VII liability as it existed under *Wards Cove*.

interpretive rule, and analogies to other statutory provisions. None of their arguments has merit.

1. The statutory structure and text do not support petitioners' view

Petitioners ground their argument in a mechanical reading of the statute. According to them, Congress set out the ADEA's substantive prohibitions in Section 623(a) and its affirmative defenses in Section 623(f). Pet. Br 22 ("Subsection (f) ... contains 'the ADEA's five affirmative defenses' " (quoting *TWA, Inc.* v. *Thurston*, 469 U.S. 111, 122 (1985))). Petitioners argue, further, that Congress' choice of the articulation "otherwise prohibited" indicates that what follows—including RFOA—are affirmative defenses. Pet. Br. 23. These arguments are wide of the mark.

1. The structure of the statute cannot bear the weight petitioners assign it. In *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989), the plaintiff raised similar arguments, arguing that Section 623(f) set out "the ADEA's narrow defenses," and therefore, the employee-benefit plan provision of Section 623(f)(2) was an affirmative defense. Brief for Appellee, No. 88-389, at 5, 8 (citing *TWA*, 469 U.S. at 121-22). This Court refused to analyze the statute mechanically, examining instead what the ADEA sought to regulate and Section 623(f)(2)'s function within that framework. *See* 492 U.S. at 176-78. That analysis led the Court to conclude that Section 623(f)(2) "is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context.... It redefines the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the [ADEA]," and, accordingly,

"the employee bears the burden of proving" its applicability. *Id.* at 181.

In light of *Betts*, the mere fact that the provisions of Section 623(f) are set apart from the primary prohibitions in Section 623(a) does not warrant treating them as affirmative defenses. Instead, the analysis should focus on each provision's role within the statute. Like the provision under review in *Betts*, the RFOA provision functions not to define an affirmative defense but to clarify the scope of prohibited conduct.[5]

2. Petitioners also argue that the Court's indication that the ADEA's provision for *bona fide* occupational qualifications (BFOQ) is an affirmative defense should be extended to RFOA, given that the two provisions appear alongside each other. Pet. Br. 27-28. This disregards the very different roles the two provisions play in the statute. BFOQ is principally, if not exclusively, a defense to disparate-treatment claims. It applies when age is *concededly* part of the employer's decisionmaking; that is, the employer acknowledges that its decision was age-based, but seeks to justify the decision on the ground that age is a "qualification" for the

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[5] In light of *Betts*, this Court's prior shorthand reference to "the ADEA's five affirmative defenses," *TWA, Inc.* v. *Thurston*, 469 U.S. 111, 122 (1985), should be given little weight. In any event, whether a provision is titled an "affirmative defense" does not resolve the ultimate question—that is, which party bears the burden of persuasion. For example, this Court referred to business necessity in *Wards Cove* as a "defense" and assigned the burden of persuasion to plaintiffs. 490 U.S. at 660. Indeed, it is not unusual in the discrimination context to divide burdens between parties, and doing so "conforms with the usual method for allocating persuasion and production burdens in the federal courts [under] Fed. R. Evid. 301." *Id.* at 659-60.

job that is "reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). Given that the ADEA's principal purpose is to restrict the use of age as a factor influencing employment decisions, it makes sense to require employers affirmatively to justify their use of age as an *explicit* factor under the BFOQ provision.

In a disparate-impact case, by contrast, "the allegedly 'otherwise prohibited' activity is not based on age," and it is here that "the RFOA provision plays its principal role." *Smith*, 544 U.S. at 239 (plurality opinion). The employer predicates its decision not on age but on facially neutral factors; and such neutral factors may well be entirely legitimate even if they correlate with age. *See id.* at 240-41. In that circumstance, requiring the plaintiff to demonstrate that use of those factors was unreasonable is simply consistent with the requirement that the plaintiff sustain the burden of proving that the disadvantage suffered was "because of ... age." In light of their very different functions, interpreting RFOA and BFOQ *in pari materia* is not warranted.[6]

3. Petitioners also rely on the phrase "otherwise prohibited," claiming that the provisions that follow, including RFOA, are therefore "defenses" to "pre-

[6] Also included within Section 623(f)(1) are actions taken where the employee's workplace is in a foreign country and complying with the ADEA's provisions would cause the employer to violate that country's laws. Petitioners cite an EEOC Policy Guidance suggesting, without explanation, that the employer should prove that compliance would violate foreign law. Pet. Br. 28. This provision is different again from RFOA—it involves conduct that by hypothesis violates the ADEA—and so again, interpretation *in pari materia* is not warranted.

sumptively illegal" conduct. Pet. Br. 20. This interpretation, however, would read the word "otherwise" out of the statute. The text dictates that it "shall not be unlawful ... to take any action otherwise prohibited *under subsections (a), (b), (c), or (e)* of this section" where the differentiation is based on RFOA. Thus, "otherwise" prohibited cannot mean prohibited "under other statutory provisions," because that role is played by the language that follows immediately after—"under subsections (a), (b), (c), or (e)." Petitioners' textual argument might be tenable if Congress had decreed that "it shall not be unlawful ... to take any action prohibited under subsections (a), (b), (c), or (e) of this section ... where the differentiation is based on reasonable factors other than age." But Congress did not do so; it inserted the word "otherwise," and "otherwise" must be given some meaning. *See Moskal* v. *United States*, 498 U.S. 103, 109 (1990) (court should "give effect, if possible, to every clause and word of a statute").[7] Accordingly, this formalistic textual argument is no more successful than petitioners' mechanical reading of the statute's structure.[8]

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[7] An obvious alternative is to construe the phrase as shorthand for "that otherwise would be prohibited."

[8] Moreover, if Congress had wanted to designate the provisions of Section 623(f)(1) affirmative defenses, far clearer means were available. *See, e.g.*, 15 U.S.C. § 1681g(e)(10) ("it is an affirmative defense"); 47 U.S.C. § 227(c)(5) ("[i]t shall be an affirmative defense").

2. Familiar burdens-assignment principles favor placing the burden of persuasion on plaintiffs

The ADEA is silent on which party bears the RFOA burden of persuasion. Petitioners and their amici nevertheless argue that "traditional policy rationales for distributing burdens" require that RFOA be construed as an affirmative defense. Pet. Br. 33; U.S. Br. 12. They rely on only one such traditional rationale—the principle that a party with access to information relevant to the matter should bear the burden. *See* Pet. Br. 33. Even were that a complete account—and it is not—it would not support petitioners' conclusion.

Access to information is "not the only consideration" in allocating the burden of persuasion "and it is by no means controlling." Fleming James, Jr., *Burdens of Proof*, 47 Va. L. Rev. 51, 60 (1961); *see also* 2 *McCormick on Evidence* § 337, at 475 (6th ed. 2006) ("Very often one must plead and prove matters as to which his adversary has superior access to the proof.") At least as important is "the extent to which a party's contention departs from what would be expected in the light of ordinary human experience. It is a matter of convenience to assume that things occurred as they usually do and to make the party who asserts the uncommon occurrence prove that it did happen as he claims." James, 47 Va. L. Rev. at 60; *see also* 2 *McCormick on Evidence* § 337, at 475-76.[9] That consideration cuts compellingly

[9] This Court has relied on both rationales in employment discrimination cases. *See, e.g., International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access

in favor of assigning to the plaintiff the burden to disprove reasonableness. Because age frequently will correlate with factors on which an employer reasonably may base an employment decision, it should come as no surprise that age-neutral employment practices will often adversely impact older employees. A statistical adverse impact on older workers does not, by itself, reliably indicate that a particular individual suffered a disadvantage "because of" age and demand an explanation from the employer as to why that is not the case. Thus, it is entirely appropriate to require the employee to prove that the challenged practice is *unreasonable*; only then may the employee fairly be said to have demonstrated that the disadvantage was "because of" age.

By itself, moreover, the access-to-information consideration is insufficient to assign the burden of persuasion on reasonableness to employers. There is no question that the employer should bear the burden of *producing* evidence that factors other than age justified the challenged employment decision. Nonetheless, the issue as to which plaintiffs will bear the burden—reasonableness of the stated factors in light of the stated goals—is an inquiry addressed to common sense and judgment, and not one of factual investigation. And even if that were not so, plaintiffs certainly have no lesser access to evidence of reasonableness than to evidence of business necessity; yet it is well settled that plaintiffs bear that burden under *Wards Cove*. In any event, "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." *Wards Cove*, 490 U.S. at 657.

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to the proof." (citing *McCormick on Evidence* §§ 337, 343 (2d ed. 1972); James, 47 Va. L. Rev. at 61).

3. The EEOC's interpretation of the RFOA clause warrants no deference

Petitioners urge the Court to defer to 29 C.F.R. § 1625.7(e), an interpretive rule they assert requires respondents to prove that petitioners' terminations were based on reasonable factors other than age. But by its terms, Section 1625.7(e) applies only to disparate *treatment* claims and imposes merely a burden of production on employers. In fact, the EEOC recently proposed changes to the rule that make clear that its existing text is inconsistent with petitioners' reading. Moreover, the Court need not defer to the EEOC's *interpretation* of Section 1625.7(e) as encompassing disparate-impact claims and imposing a burden of persuasion on employers, because that interpretation conflicts with the plain text of the rule. In any event, even if the EEOC's substantive position concerning the burden of proof were entitled to a degree of respect under *Skidmore*, it lacks the power to persuade here.

a. Section 1625.7(e) does not apply to disparate-impact claims and does not impose a burden of persuasion

The plain language of Section 1625.7(e) makes clear that it does not apply to disparate-impact claims: "When the exception of 'a reasonable factor other than age' is raised against *an individual claim* of *discriminatory treatment*, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." (emphasis added). The terms "individual claim" and "discriminatory treatment" fairly encompass individual claims of disparate treatment, such as refusal to hire on the basis of age. They do not describe disparate-impact claims, which address the adverse effects of a facially neutral employment practice

on a protected *class* of employees, *see Wards Cove*, 490 U.S. at 657.

The EEOC appears to have recognized this. In a recent notice of proposed rulemaking, it proposes deleting from Section 1625.7(e) the phrase "against an individual claim of discriminatory treatment." 73 Fed. Reg. 16,807, 16,809 (Mar. 31, 2008). The revised rule is intended to apply to both disparate-impact and disparate-treatment claims. *Id.* at 16,808.

Petitioners' contention that the existing rule already serves that purpose both contravenes the unambiguous language of Section 1625.7(e) and fails adequately to account for subsection (d) of the same rule—the subsection that *does* address disparate-impact claims:

> (d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity[.]

29 C.F.R. § 1625.7(d). Adopted at the same time as subsection (e), subsection (d)—which all agree is invalid and has no application here—plainly is directed at disparate-impact claims. 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981); *see also* 70 Fed. Reg. 65,360, 65,361 (Oct. 31, 2005) (subsection 1625.7(d) is a "regulation on disparate impact").[10]

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[10] The EEOC acknowledges that Section 1625.7(d) is inconsistent with *Smith* and must be revised, because "the RFOA test,

Given that every other subsection of Section 1625.7 makes no distinction between disparate treatment and disparate impact, the presence of such a distinction in subsections (d) and (e) underscores that it was made intentionally and must be given effect. In short, Section 1625.7(e) is a disparate-treatment regulation and has no application to disparate-impact cases.[11]

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rather than the business-necessity test, is the appropriate standard" for disparate-impact claims. 73 Fed. Reg. at 16,808; *see* U.S. Br. 16 n.1. It is therefore unsurprising that petitioners resort to stretching Section 1625.7's disparate-treatment provision beyond its terms.

[11] Petitioners' reading of Section 1625.7(e) is also at odds with the rule's history. As originally proposed, it could have been read to apply to *all* ADEA cases without distinction: "(e) The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer." Proposed Interpretations, 44 Fed. Reg. 68,858, 68,861 (Nov. 30, 1979). Prior to adoption, however, the EEOC revised the rule to clarify that it applies only to disparate treatment:

> Paragraph (e) of § 1625.7 has been modified to clarify its initial intent that when the defense of "a reasonable factor other than age" is raised against *an individual claim of discriminatory treatment*, the employer bears the burden of showing that the "reasonable factor other than age" exists factually. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

46 Fed. Reg. at 47,725 (emphasis added). Importantly, the *Loeb* decision cited in the EEOC's explanation was a disparate-treatment case. 600 F.2d at 1008-12.

Although petitioners note that the initial RFOA rule enacted by the DOL did not expressly state that it applied only to disparate-treatment claims (Pet. Br. 38-39; U.S. Br. 15), that fact is unsurprising given that the regulation predated this Court's recognition of disparate impact in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In any event, the scope of a predecessor regulation cannot

Similarly, petitioners' view that Section 1625.7(e) imposes a burden of persuasion is inconsistent with the rule's text and history. The rule provides that an employer bears the burden merely of "*showing* that the 'reasonable factor other than age' *exists factually*." (emphasis added). These terms are best read as imposing on employers a burden only of production. The EEOC's proposed changes, which would replace the word "showing" with "proving," support this interpretation of the existing rule. 73 Fed. Reg. at 16,809. So does the history of Section 1625.7(e). As discussed in note 11, *supra*, the EEOC pointed to *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), in explaining why it was revising the DOL's regulation. 46 Fed. Reg. at 47,725. And in *Loeb*—a disparate treatment case—the First Circuit held that defendants have only a burden of production on RFOA, not a burden of persuasion. 600 F.2d at 1008-12.

Petitioners contend that, even if the text of Section 1625.7(e) appears to apply only to disparate-treatment claims, the Court should nevertheless defer to the EEOC's *interpretation* that the rule also applies to disparate-impact claims. Pet. Br. 39-40 & n.25; U.S. Br. 17-18. But an agency's interpretation of its own regulation merits deference only when not "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *see Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). As explained above, the language limiting Section 1625.7(e) to disparate-treatment claims is

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change the EEOC's contemporaneous explanation of Section 1625.7(e), quoted above.

unambiguous, and *Auer* deference is therefore inappropriate.[12] Were the Court to hold otherwise, it would permit the EEOC, via amicus brief, to extend Section 1625.7(e) to disparate-impact claims in order to fill the gap left by *Smith*'s invalidation of Section 1625.7(d), the *actual* disparate-impact provision. Such deference would unduly "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588.

b. At most, the EEOC's regulation and interpretations are entitled to Skidmore deference

Even if the Court does defer to the EEOC's interpretation of Section 1625.7(e), the Court must then decide whether the *substance* of the rule itself warrants deference. At most, the rule here is entitled respect under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and under that standard, the EEOC's position fails to persuade.

As the EEOC has indicated, Section 1625.7 merely contains "interpretative rules or statements of policy." 46 Fed. Reg. at 47,724; *see also Smith*, 544 U.S. at 263-64 (O'Connor, J., concurring in the judgment) (referring to Section 1625.7 as "an [EEOC] policy statement construing the RFOA provision" and as an "interpretative rule or policy statement"). Indeed, the EEOC structured Part 1625 to distinguish the rules that embody "Interpretations" (Subpart A) from those that consti-

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[12] Similarly, because the rule's text—especially when read in light of the rule's history—imposes merely a burden of production on employers and not one of persuasion, the EEOC is not entitled to *Auer* deference on that issue.

tute "Substantive Regulations" (Subpart B). *See* 29 C.F.R. Part 1625.

Unlike substantive (or "legislative") rules, interpretative rules lack "the force and effect of law." *See Shalala* v. *Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977). As such a rule, Section 1625.7 does not warrant *Chevron* deference. *See United States* v. *Mead*, 533 U.S. 218, 232 (2001); *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991); *Batterton*, 432 U.S. at 425 n.9.[11] Thus, if the EEOC's interpretive rule is entitled to any deference at all, it is at most the "respect" accorded under *Skidmore*. *See Christensen*, 529 U.S. at 587.

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[11] *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339 (2007), is not to the contrary. There the Court determined that a DOL rule, though labeled an "Interpretation[]," was in reality a "binding application of [the DOL's] rulemaking authority" under the FLSA. 127 S. Ct. at 2349-50. In doing so, however, the Court emphasized that the rule, which effectively increased the scope of an FLSA exemption covering certain companionship workers, "directly govern[ed] the conduct of the public" and "affect[ed] individual rights and obligations." *Id.* at 2350 (citations and internal quotation marks omitted). The interpretive rule at issue here, however, does not purport to govern employers' day-to-day conduct or create duties in any way pertinent to the EEOC's administration of the ADEA. At most, the rule is directed to the governance of judicial proceedings, a matter well outside the agency's sphere of expertise or gap-filling authority. *Cf. id.* at 2350 (ultimate question is whether Congress would have intended and expected courts to treat agency rule as an exercise of delegated gap-filling authority). Moreover, the fact that the EEOC has repealed some interpretive rules and reenacted them as "legislative" rules suggests that the agency recognizes its interpretations do not have the force and effect of law. *See* 60 Fed. Reg. 51,762 (Oct. 3, 1995) (seeking comment on proposal for "rescinding the existing interpretation" of apprenticeship programs in Subpart A and "issuing a legislative rule" concerning such programs in Subpart B).

Petitioners insist that the EEOC's interpretive rule deserves deference as a reasonable interpretation of ambiguous ADEA language, *see EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988), and one consistently held by the DOL and EEOC since shortly after the ADEA's passage, *see EEOC* v. *Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). As discussed above, however, the DOL and EEOC have *not* consistently interpreted the rule as applying to disparate-impact claims or imposing a burden of persuasion.[14] Moreover, unlike the instant case, both *Commercial Office Products* and *Associated Dry Goods* involved statutory provisions governing pre-litigation EEOC proceedings.[15] Those rules concerned "technical issue[s] of agency procedure," as to which the agency had unique expertise. *See Commercial Office Prods.*, 486 U.S. at 125 (O'Connor, J., concurring in part and concurring in the judgment). The same is true of *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1154-60 (2008), which concerned whether submission of certain documents to the EEOC constituted a "charge of

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[14] Even if 29 C.F.R. § 1625.7 could be deemed consistent with the original DOL regulation, *see supra* note 11, *Smith* clarifies that the interpretation set forth in subsection (d) was consistently wrong. There is good reason then, to view the remainder of the RFOA provision, including subsection (e), with a critical eye.

[15] *See Commercial Office Prods.*, 486 U.S. at 110-16 (addressing whether state agency waiver of 60-day processing period under worksharing agreement with EEOC "terminat[ed]" proceedings within meaning of Title VII so that EEOC could deem charge filed); *Assoc. Dry Goods*, 449 U.S. at 593-604 (addressing whether EEOC's prelitigation disclosure of confidential information to employee was a "public" disclosure violating Title VII).

discrimination" triggering the agency's conciliation and enforcement mechanisms.

By contrast, the EEOC interpretation at issue here does not implicate the agency's interest in administering its own proceedings. Rather, Section 1625.7(e) purports to allocate the RFOA burden of proof in *judicial* proceedings, a subject traditionally entrusted to the expertise of the courts. *Cf. Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-50 (1990). Indeed, the case against deference here is particularly strong because, through its own rule, the EEOC has assigned to itself a lesser burden of proof for those cases in which it is a litigant. If such administrative encroachment merits any deference at all, again it should at most be the respect accorded under *Skidmore*.

Under *Skidmore*, the question is whether Section 1625.7(e) has "the power to persuade." *See Christensen*, 529 U.S. at 587; *Martin*, 499 U.S. at 157; *Skidmore*, 323 U.S. at 140. The better reading of the ADEA's text, its purpose, and this Court's precedents is that the burden of proof on RFOA should be borne by plaintiffs in disparate-impact cases. To the extent Section 1625.7(e) suggests otherwise, it should be given no weight.

4. The Equal Pay Act is not analogous

Petitioners contend that the Equal Pay Act ("EPA"), as construed in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), supports deeming RFOA an affirmative defense. *Corning* held that the employer bears the burden of persuasion with respect to the EPA's "any other factor other than sex" provision, 29 U.S.C. § 206(d)(1). *See* 417 U.S. at 196.

Asserting that the EPA and the ADEA are "similarly-structured" and "serve[] the same basic purpose" (Pet. Br. 27), petitioners state that "[l]ike the ADEA, the EPA begins with a general prohibition against workplace discrimination," and then "establishes a series of exceptions to the general rule," (Pet. Br. 25). But petitioners gloss over significant textual differences between the two provisions and fail to take account of their very different functions.

The EPA provision that defines a "violation," *County of Washington* v. *Gunther*, 452 U.S. 188, 196 (1981), provides that no employer

> shall discriminate ... between employees on the basis of sex by paying wages to employees ... at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

29 U.S.C. § 206(d)(1).

As the Court explained in *Corning*, "to make out a case under the [EPA]," an employee must establish not only "that an employer pays different wages to employees of opposite sexes," but also that the wages are paid " 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' " 417 U.S. at 195 (quoting 29 U.S.C. § 206(d)(1)). If a plaintiff meets these requirements, "the burden shifts to the employer to show that the differential is justified under one of the [EPA]'s four exceptions." *Id.* at 196. This framework makes sense, because it is only after the employee has demonstrated the existence of a

wage differential between the sexes that cannot be explained by typical market factors—such as skill, responsibility, or working conditions—that the employer is asked to account for the discrepancy. *Cf. Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.").

The EPA is far from a disparate-impact statute.[16] The burden of persuasion shifts to the employer to justify its practices only once the employee has proven disparate treatment of the sexes in a particularly compelling manner. As with the BFOQ provision of the ADEA, therefore, the fact that the employer has the burden of persuasion on certain defenses under the EPA is of little persuasive force in this case.

5. Petitioners misconstrue the legislative history of the OWBPA

Petitioners contend that the legislative history of the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) ("OWBPA"), reflects congressional approval of an EEOC interpretation placing the RFOA burden of persuasion on employers, and shows that Congress understood the "otherwise prohibited" language of Section 623(f)(1) to signify an affirmative defense. In passing the OWBPA, however,

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[16] *See County of Washington*, 452 U.S. at 170 (noting that the "any other factor other than sex" clause acts to "confine the application of the [EPA] to wage differentials attributable to sex discrimination"); *Smith*, 544 U.S. at 239 n.11 (plurality opinion) (explaining that the clause bars disparate-impact claims).

Congress considered and rejected proposals that would have expressly allocated the RFOA burden of proof to employers.

The OWBPA responded to this Court's decision in *Betts*, which adopted a broad construction of the ADEA's employee-benefit plan provision in Section 623(f)(2), and determined that employees bear the burden of proving that it does not apply. *See* 492 U.S. at 180-81; OWBPA § 101, 104 Stat. 978. In the OWBPA, Congress narrowed the Section 623(f)(2) provision and expressly placed the burden of proving its applicability on employers. *Id.* § 103(1), 104 Stat. 978-79 (employer "ha[s] the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act.").

Although the OWBPA did not amend Section 623(f)(1) to place the burden of persuasion under that provision on employers, earlier bills would have done so. *See* S. 1511, 101st Cong. § 103 (1989); H.R. 3200, 101st Cong. § 4 (1989). It was these versions that were analyzed in the legislative reports cited by petitioners, who concede that the Senate *deleted* the proposed amendment to Section 623(f)(1) from the final enacted version. Even so, they argue, the OWBPA's addition of "otherwise prohibited" to Section 623(f)(2) shows that Congress understood that language to signify an affirmative defense and thereby ratified an EEOC interpretation deeming RFOA an affirmative defense. But the legislative history indicates otherwise.

Petitioners point to language in legislative reports stating that "otherwise prohibited" in Section 623(f)(1) was commonly understood to signify an affirmative defense, and endorsing a perceived EEOC position that the employer bears the burden of proving RFOA. But

petitioners ignore the comments of other committee members, who warned that allocating the RFOA burden to employers would go beyond merely reversing *Betts*—which had not addressed Section 623(f)(1)—and would effect a change of pre-*Betts* law in five circuits. *See* S. Rep. No. 101-263, at 58 (1990); H.R. Rep. No. 101-664, at 82-83 (1990). Those legislators explained that "allocating the [Section 623(f)(1)] burden of proof in a manner that is *not* consistent with the way courts historically have allocated the respective burdens" would overreach the OWBPA's objective, namely, "return[ing] to the state of law prior to the *Betts* decision." H.R. Rep. No. 101-664, at 82 (emphasis added); *see id.* at 83 (bill would rewrite RFOA burden of proof rules under "guise of reinstating the prior law"); S. Rep. No. 101-263, at 58 (proposed placement of RFOA burden on employers was contrary to bill's purported purpose of "simply restor[ing] the original intent of the ADEA").[17]

Eventually, Senator Metzenbaum (co-sponsor of the original S. 1511), joined by Senator Hatch, introduced a compromise version that deleted the proposed amendment to Section 623(f)(1). *See* 136 Cong. Rec. S13,594 (daily ed. Sept. 24, 1990). The final statement of the Senate managers explained the deletion:

> [We] are not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law. *Prior to* Betts, *courts had allocated the burden of proof under paragraph 4(f)(1).* This bill overturns the Supreme Court's allocation of the burden of

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[17] Senators Hatch and Grassley reiterated these concerns during the Senate debates. *See* 136 Cong. Rec. S13,247 (daily ed. Sept. 17, 1990); S13,298 (daily ed. Sept. 18, 1990).

> proof under paragraph 4(f)(2). Because the allocation of the burden of proof under paragraph 4(f)(1) was not at issue in *Betts*, the managers find no need to address it in this bill.

136 Cong. Rec. S13,596-13,597 (daily ed. Sept. 24, 1990) (emphasis added). Contrary to petitioners' claim, then, the deletion of Section 623(f)(1) from S. 1511 was not the product of a congressional desire to ratify the EEOC's interpretation of Section 623(f)(1); nor was it a determination that the phrase "otherwise prohibited" sufficed to establish an affirmative defense. Rather, the deletion reflected a legislative agreement not to interfere with court decisions allocating the burden of proof under Section 623(f)(1).

The government suggests that Section 623(f)(1) was deleted from S. 1511 as "superfluous," because the "otherwise prohibited" language already in that section allocated the burden of proof to employers. This argument fails both to account for the legislative history described above and "to give effect, if possible, to every clause and word of [the] statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). In amending Section 623(f)(2), Congress added *both* "otherwise prohibited" language *and* the statement: "An employer ... shall have the burden of proving that such actions are lawful." OWBPA § 103(1), 104 Stat. 978-79. But if the language "otherwise prohibited" sufficed in itself to allocate the burden, then the express burden of proof language in Section 623(f)(2) would have been unnecessary.

In any event, how Congress may have viewed Section 623(f)(1) when it amended Section 623(f)(2) is of no import, for "the interpretation given by one Congress ... to an earlier statute is of little assistance in discerning the meaning of that statute." *Betts*, 492 U.S. at 168;

see also United States v. *Price*, 361 US. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). Thus, the OWBPA's legislative history cannot determine the burden of proof applicable to a preexisting provision like Section 623(f)(1).

* * *

The Second Circuit properly imposed on petitioners the burden of proving that the challenged employment action was not based on reasonable factors other than age. Because petitioners do not contend that they can carry that burden, the judgment should be affirmed.

II. The Judgment Below Should Be Affirmed Even If The Employer Bears The Burden Of Persuasion On Reasonableness

Even if the Court concludes that respondents bear the burden of persuasion on RFOA, it nonetheless should affirm. The evidence in the record establishes, as a matter of law, that respondents' RIF determinations were based on reasonable non-age factors. And even if this Court concludes that *Wards Cove* provides the framework for ADEA disparate-impact claims, it should affirm on the separate ground that petitioners failed to carry their burdens under that framework.

A. Respondents Have Established RFOA As A Matter Of Law

In *Smith*, this Court explained that an employer need not choose the best way to achieve its business objectives so long as it chooses a reasonable one.[18] Un-

[18] 544 U.S. at 243 ("Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its

der that standard, respondents are entitled to judgment as a matter of law even if they bear the burden of persuasion on reasonable factors other than age. Given respondents' proof at trial, no reasonable juror could conclude that the four factors used in KAPL's RIF are unreasonable bases for termination decisions generally. And even if KAPL conceivably could have done more to cabin its managers' flexibility and criticality determinations, no reasonable juror could conclude that reliance on those factors was unreasonable given the training managers received and the review to which their determinations were subjected. *Cf. Smith*, 544 U.S. at 243 ("While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable.").

KAPL introduced unrebutted evidence that performance, company service, flexibility, and criticality are reasonable factors to use in making termination decisions. Senior managers explained that KAPL decided to use those factors after considering the practices of numerous other companies that had performed similar layoffs. Tr. 340, 1337, 1347-48, 4089. KAPL's expert, Frank Landy, a "specialist in industrial psychology with substantial corporate downsizing experience," Pet. App. 16a, testified that the four criteria "form the core of most reasonable and effective systems" and added, "I haven't seen any systems for making personnel decisions in the last couple decades that have not included those four things." Tr. 4092-96. Petitioners did not even cross-examine Landy. Tr. 4116.

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goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.").

KAPL also demonstrated that flexibility and criticality were particularly appropriate factors given the circumstances that precipitated the RIF. Because of the changing nature of the laboratory's work and the government's mandate that KAPL perform more work with fewer people, employees' flexibility to perform tasks outside their existing roles was imperative. J.A. 121, 126-27; Tr. 1023-24, 1403-04. Criticality was likewise key because KAPL needed to retain those employees who possessed unique knowledge and skills essential to the laboratory's ongoing work. Tr. 1023-24, 1134-35, 1404-05; J.A. 102-03.

Although the factors of criticality and flexibility necessarily involve some individualized judgments, KAPL introduced unrefuted evidence that it cabined its managers' discretion to avoid any danger that these criteria might be used in an arbitrary manner. KAPL provided extensive training to managers involved in the RIF process and supplied them with clear written guidelines on how to apply the RIF criteria. Tr. 984-85, 1002-04, 1023-24, 1410-15, 2732-33, 4090-91; J.A. 117-22. Landy testified that the "training programs that KAPL had developed and delivered for this were really very, very good .... [They were] as good, if not better than any others I had seen for accomplishing the same goal." Tr. 4090-91. He further explained that the criticality and flexibility determinations were "guided" judgments. Tr. 4099-4100 ("People knew what they were rating, they knew what the numbers meant and they were evaluating based on their knowledge of the capabilities of the people they were rating."). Several witnesses testified that the Review Board then rigorously reviewed managers' decisions concerning all aspects of the RIF, including determinations of criticality and flexibility. Tr. 487-88, 832-33, 1008-09, 1024, 1293, 1410,

1459-60, 2825, 3197, 3374-75, 3715-18, 4127, 4138; J.A. 97, 115-16. Petitioners' own expert acknowledged that the Review Board "reviewed each of these decisions to make sure that the central management at KAPL agreed with the decision that the lower managers made." Tr. 1876.

Petitioners failed to counter respondents' evidence of the reasonableness of the RIF criteria and "did not directly challenge the testimony of KAPL principals regarding the planning and execution of the [RIF]." Pet. App. 18a. In fact, the *only* affirmative support in the record for petitioners' position before this Court that "respondents' unaudited reliance on subjective decisionmaking during an involuntary reduction in force had a substantial and unnecessary negative impact on the employment rights of older workers" (Pet. Br. 18)—a position they advocated neither at trial nor on appeal in *Meacham I*—is a single, speculative answer given by their expert, Dr. Janice Madden.[19] *See* Tr. 1927-28. On cross, she hypothesized that "the system set up for the evaluation did not offer adequate protections to keep the prejudices of managers from influencing the outcome." *Id.* But she never explained that statement; it appeared to be based solely on the fact that older employees were statistically more likely to be affected by the RIF. *See* Tr. 1928. Madden never

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[19] As discussed in the Statement, the theory petitioners tried to the jury—over respondents' objections—was that KAPL's use of an involuntary layoff *in itself* violated the ADEA. Because petitioners contended that KAPL should have instituted a hiring freeze or expanded the Voluntary Separation Plan *instead of* performing the RIF, their testimony did not focus on the reasonableness of the RIF factors or KAPL's review of those factors' application.

testified that petitioners' scores were incorrect or the result of age-based prejudices; rather, she explained that she assumed productivity was equally distributed between older and younger workers, and under that assumption concluded that the results of the RIF could not be explained by chance. Tr. 1905, 1912-17, 1928, 1950-51. Importantly, Madden also failed to explain what additional protections KAPL could have implemented that would have reduced the disparate impact on older employees.

Even under the exacting standard for review of jury verdicts, petitioners' evidence was insufficient as a matter of law to rebut respondents' voluminous evidence that KAPL employed reasonable criteria to guide the RIF and implemented those criteria in a reasonable manner. Moreover, as KAPL's expert explained, numerous major employers routinely use downsizing procedures very similar to those employed in the RIF. Tr. 4092-96. To hold that those procedures are unreasonable would unwisely constrain employers' efforts to reduce their workforces while retaining vital employees and would put considerable pressure on employers to use quotas or give preferential treatment to older employees. *Cf. Wards Cove*, 490 U.S. at 652 (rejecting construction of disparate-impact test that would encourage employers to adopt racial quotas).

As this Court recognized in *Smith*, there often is a correlation between a person's age and ability to perform a given job, and thus "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." 544 U.S. at 240-41. The evidence presented at trial demonstrates that this is just such a case. Indeed, given that the JMOL standard "mirrors" the standard for summary judgment, *see Anderson* v. *Liberty Lobby, Inc.*,

477 U.S. 242, 250 (1986), this case is no different from *Smith*, where this Court affirmed summary judgment on the ground that the non-age factors considered by the employer were reasonable as a matter of law. 544 U.S. at 231-32, 242-43. Here, respondents based their decision on reasonable factors other than age, and they too are therefore entitled to judgment as a matter of law—regardless of who bears the burden of proof.[20]

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[20] Petitioners contend that this Court should not reach the question of what evidence was presented because, although respondents "did plead the RFOA provision in their answer," they "forfeited" their right to assert it by failing to ask for a corresponding jury instruction or to object to the instructions that were given. Pet. Br. 52. That is wrong. At trial, both the parties and the district court labored under a misconception as to the scope of RFOA. At the time, an EEOC rule stated that the RFOA provision required a showing of "business necessity," 29 C.F.R. 1625.7(d), and the Second Circuit applied an unadulterated *Wards Cove* analysis to ADEA disparate-impact claims, *Smith* v. *Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999). However, *Smith* v. *City of Jackson* made clear that the RFOA inquiry focuses on "reasonableness." 544 U.S. at 243. The district court's failure to instruct the jury on RFOA was thus plain error affecting substantial rights, and may be corrected by this Court. *See Johnson* v. *United States*, 520 U.S. 461, 468 (1997) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); *United States* v. *Olano*, 507 U.S. 725, 733 (1993) ("failure to make the timely assertion of a right" "does not extinguish an 'error' "); Fed. R. Civ. P. 51(d)(2) ("A court may consider a plain error in the instructions that has not been preserved ... if the error affects substantial rights.").

Indeed, in light of the history of this case and the evolving state of the law, it would be appropriate for the Court to forego plain-error analysis and apply plenary review. *Cf. City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120-21 (1988) (applying plenary review where the "legal landscape['s] ... contours are in a state of evolving definition and uncertainty"); *City of Newport* v. *Fact*

B. Respondents Are Entitled To Judgment As A Matter Of Law Under The *Wards Cove* Framework

This Court should also affirm because respondents are entitled to judgment under *Wards Cove* alone. In concluding otherwise in its initial decision, the Second Circuit affirmed judgment for petitioners on a theory that the jury never heard, that petitioners never pressed, and that is not supported by the evidence.

At trial, petitioners' disparate-impact theory was that the RIF as a whole, and not merely certain aspects of the RIF, had an adverse impact on older employees. Further, petitioners contended that because KAPL could serve its business objectives without resorting to involuntary layoffs, the ADEA required it to adopt one of two alternatives to the RIF: "(1) opening the VSP to the entire workforce except those with critical skills and (2) a hiring freeze." Pet. App. 44a; *see supra* Statement. In summation, petitioners' counsel set forth their theory in simple terms: "I don't think that the defendants needed to do this layoff." Tr. 4634; *see also* Tr. 4635; JMOL Opp. 20-21.

This argument failed to satisfy steps one and three of *Wards Cove*. Thus, the Second Circuit properly rejected petitioners' approach, concluding that "[e]mployers are free to decide that layoffs are necessary." Pet. App. 60a. Upon reaching this conclusion, the court should have vacated the judgment for petitioners, because the jury's verdict rested on an erroneous theory

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Concerts, Inc., 453 U.S. 247, 256-57 (1981) (refusing to "limit[] ... review to a restrictive 'plain error' standard" where "the contours of municipal liability under § 1983[] ... are currently in a state of evolving definition and uncertainty.... The very novelty of the legal issue at stake counsels unconstricted review.").

of liability. Instead, and without being invited to do so by petitioners—who continued to defend the verdict solely on their theory at trial, *see* Plaintiffs-Appellees' *Meacham I* Br. 35-36—the Second Circuit proceeded to conclude:

> At least one suitable alternative is clear from the record: KAPL could have designed [a RIF] with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias.

Pet. App. 60a. The Second Circuit thus upheld the jury's verdict on a theory the jury never heard. This was error. *Cf. McCormick* v. *United States*, 500 U.S. 257, 270 n.8 (1991) ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury."). Moreover, because the alternative rationale came from the Second Circuit and not the parties, the briefs had not addressed the record evidence regarding KAPL's oversight and review processes. Without guidance as to the key testimony brought out in a five-week trial, the court missed extensive evidence of planning, training, and oversight that went into the RIF. *See supra* Statement & Part II.A.1. Thus, even leaving aside RFOA, petitioners did not carry their burden under *Wards Cove*.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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APPENDICES

STATUTORY AND REGULATORY APPENDIX

AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act, 29 U.S.C. § 623, provides in relevant part:

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an

employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment

made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII, 42 U.S.C. § 2000e-2, provides in relevant part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining

programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and

the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession au-

thorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

• • •

EQUAL PAY ACT

The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — AGE DISCRIMINATION IN EMPLOYMENT ACT REGULATIONS

Section 1625.7 of Title 29 of the Code of Federal Regulations provides:

(a) Section 4(f)(1) of the Act provides that

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the bur-

den of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f) (2) exception to the Act.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF PROPOSED RULEMAKING
29 CFR PART 1625

Volume 73 Federal Register 16,807, 16,809 (Mar. 31, 2008) provides in relevant part:

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR chapter XIV part 1625 as follows:

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

* * *

Subpart A–Interpretations

2. Revise paragraphs (d) and (e) of § 1625.7 to read as follows:

§ 1625.7 Differentiations based on reasonable factors other than age.

* * *

(d) Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparities.

(e) Whenever the exception of "a reasonable factor other than age" is raised, the employer bears the burden of proving that the "reasonable factor other than age" exists factually.

* * *

(16)

No. 06-1505 4-11-08

IN THE

Supreme Court of the United States

Clifford B. Meacham, *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory, *et al.*

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

By its terms, the RFOA provision applies only to conduct that is "otherwise prohibited" elsewhere in the ADEA. As a result, it is naturally read as an exemption from liability. And this Court has long treated such exemptions as affirmative defenses, absent some strong indication of legislative intent to the contrary. Pet. Br. 20-23.

Respondents insist that appearances are deceiving in this case. Although the RFOA provision *seems* to exempt otherwise unlawful conduct, they say, in reality it simply restates, in negative form, an element of the unlawful employment practice defined by Section 4(a)(2) of the Act. That is, unless an employment practice is unreasonable, they insist, it cannot have a disparate impact on older workers "because of" their age, a requirement embedded in Section 4(a)(2)'s definition of an unlawful employment practice. Accordingly, respondents argue, the plaintiff needs to demonstrate that the employer's conduct was unreasonable in order to prove that the defendant's conduct is unlawful under Section 4(a)(2). The RFOA provision thus simply restates what would otherwise go without saying, rather than providing an affirmative defense for conduct that would be "otherwise prohibited" by the statute but for its reasonableness.

Respondents seem to be aware that this interpretation faces substantial textual obstacles. For one thing, although respondents say that the RFOA provision merely restates a part of the definition of an unlawful employment practice, it is set out as a clause in a sentence that establishes two undisputed affirmative defenses. And, as mentioned before, it is expressed using the language and

structure of an affirmative defense, exempting from liability conduct "otherwise prohibited" by the Act.

In addition, the expressly definitional provision, Section 4(a)(2), describes the unlawful employment practice in an ADEA disparate impact case using the same language as Section 703(a)(2) of Title VII. And in *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that Congress intended the identical language in Section 703(a)(2) of Title VII and Section 4(a)(2) of the ADEA to have the same meaning. *Id.* at 233-34 (plurality opinion). But while both provisions prohibit only actions that have a disparate impact "because of" a protected characteristic, this Court has not construed Title VII to require proof of unreasonableness.

Undeterred, respondents claim that Congress did not really mean what it seemed to say, and neither did this Court. Although the Court seemingly said in *City of Jackson* that Congress meant the same test – the one laid out in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) – to define the meaning of the common language in the disparate impact provisions of Title VII and the ADEA, 544 U.S. at 240, respondents insist that all the Court really meant was that one feature of *Wards Cove* – its reiteration of the general principle that the plaintiff bears the burden of proving its case-in-chief – applies to both statutes. And, they say, although Congress used the same language in Title VII and the ADEA, it could not have meant that language to have the same meaning. For this conclusion, they point to nothing in the language or legislative history of either statute. Instead, respondents and their amici simply assert that given the differences between age and other kinds of discrimination, it makes sense as a matter of policy to require plaintiffs to prove the

unreasonableness of an employer's conduct in ADEA cases.

Respondents are wrong. The language of the statute, and this Court's decision in *City of Jackson*, leave no room for their interpretation. The identical language of the ADEA and Title VII has the identical meaning, implemented through the same test, which this Court set forth in *Wards Cove*. Congress took into account the differences between age and other forms of discrimination by providing employers a generous affirmative defense in the RFOA provision and by *leaving in place* the *Wards Cove* test for ADEA cases when it lowered the bar for Title VII plaintiffs in the Civil Rights Act of 1991. If respondents believe that these accommodations were insufficiently generous to employers, they must seek relief from the legislature, not from this Court.

I. An ADEA Plaintiff Need Not Prove An Employer's Conduct Is Unreasonable In Order To Show That It Has A Disparate Impact "Because Of" Age.

Respondents' argument depends on two propositions that are precluded by *City of Jackson* and the plain text of the ADEA. First, they must convince the Court that "because of" means two very different things in the ADEA and Title VII. Second, they must demonstrate that an employment practice cannot have a disparate impact "because of . . . age," unless it is unreasonable. They can do neither.

1. In *City of Jackson*, the Court explained that the language of Section 4(a)(2) was "derived *in haec verba* from Title VII," giving rise to the strong presumption that Congress "intended that text to have the same

meaning in both statutes." 544 U.S. at 233-34 (plurality opinion) (citation omitted).[1] Furthermore, *City of Jackson* made clear that this common meaning is implemented through the same test: the one this Court established in *Wards Cove*. *Id.* at 241. The Court explained that when Congress modified the *Wards Cove* analysis in the Civil Rights Act of 1991, but applied those changes only to Title VII and not to the ADEA, Congress indicated its intent that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remain[] applicable to the ADEA." *Id.*

Respondents insist that the Court misspoke, and that all it really meant to say was only that *Wards Cove* applies to the extent that it teaches that "the persuasion burden ... must remain with the plaintiff." Br. 25-26 (citation omitted). That is an implausible reading of both this Court's opinion and the ADEA. The reason the Court believed *Wards Cove*, developed for Title VII, had any application to the ADEA at all was because of its prior conclusion that by using the same language in both statutes, Congress meant to define the same unlawful employment practice, defined by the same test. As discussed below, Congress accommodated the differences between age and other forms of discrimination elsewhere.

---

[1] In *City of Jackson*, Justice Scalia concurred in the judgment, agreeing "with all of the Court's reasoning" in the plurality opinion, but would have found that reasoning a basis "not for independent determination" of the question before the Court, but as a reason to defer to the EEOC's views on the issue. 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment). For that reason, like Justice Scalia, petitioners speak of the plurality opinion as expressing the views of the "Court."

2. Even if respondents' view were not precluded by the Court's holding in *City of Jackson*, their assertion that a practice must be unreasonable in order to affect older workers "because of" age makes no sense either linguistically or in terms of the purposes of the statute.

a. The phrase "because of age" refers to causation. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989). In a provision proscribing disparate treatment, the phrase requires proof of intentional discrimination, *i.e.*, proof that the employer selected the plaintiff for adverse treatment because of her age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-10 (1993). In the disparate impact context, the "because of age" element requires the plaintiffs to prove that the challenged employment practice "has caused the [adverse employment action] *because of* their membership in a protected group." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1989) (emphasis added). They do so by showing, usually through statistical evidence, that the practice affects older workers disproportionately as a group, thereby demonstrating that the effect is felt by the particular plaintiff because of her age, rather than for some other reason specific to her. *Id.* Disparate impact plaintiffs thus establish that their treatment is "because of" a protected characteristic by satisfying the first step of *Wards Cove*. *See id.*; *Wards Cove*, 490 U.S. at 656-58.[3]

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[3] In this case, the jury was instructed that to meet this burden, plaintiffs were required to show that the statistical disparity they identified was "caused by the ages of the plaintiffs" and not, "on the other hand, by some other factors unrelated to the plaintiffs age," such as their "education, work performance, skills, flexibility and criticality . . . as compared to

Whether an employment practice is reasonable or not has no bearing on whether it affects older workers disproportionately because of their age. For example, an employer's decision to require workers for a particular position to be able to lift 50 pounds may or may not be reasonable, depending on the job. But it is very likely to have a disparate impact on older workers because of their age. And that likelihood does not change depending on whether or not the requirement is reasonable.

b. Respondents' theory also makes little sense in terms of the purposes of disparate impact analysis. Requiring the plaintiff to prove unreasonableness might make some sense if the point of the *Wards Cove* test were to provide a basis for concluding that the employer was engaging in *intentional* discrimination. Indeed, much of respondents' and their amicis' briefs seem premised on the unstated (and therefore undefended) assumption that the plaintiff's case-in-chief must be designed to give rise to an inference of intentional discrimination in order to satisfy the plaintiff's obligation to show that she has been discriminated against "because of" her age.[3]

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other similarly situated employees." Tr. 4734. The jury found, and the district court and court of appeals confirmed, that plaintiffs had satisfied that burden, despite respondents' insistence that petitioners were selected for termination because they were, in fact, the least critical and flexible workers in the lab. *See* J.A. 73 (jury verdict form finding that "plaintiffs have proven that a specific employment practice . . . had an adverse impact on the plaintiffs because of their age"); Pet. App. 85a-91a (district court); Pet. App. 58a-59a (court of appeals).

[3] Respondents use the language of disparate treatment when they complain, with seemingly intentional imprecision, that the *Wards Cove* showing in age cases "has less probative

But any such assumption would be mistaken. *City of Jackson* rejected the contention that the phrase "because of . . . age" in Section 4(a)(2) limits the ADEA to cases of intentional discrimination. *Compare* 544 U.S. 235-36 (plurality opinion), *and id.* at 243-44 (Scalia, J., concurring in part and concurring in the judgment), *with id.* at 248, 249 (O'Connor, J., concurring in the judgment). It is therefore unsurprising that the *Wards Cove* showing does not necessarily give rise to a strong inference of intentional discrimination, as it was not designed for that purpose. Instead, this Court has repeatedly recognized that disparate impact claims are available precisely in order to provide relief when practices are *not* intentionally discriminatory,[4] but nonetheless, even in the "absence of discriminatory intent," *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), "are discriminatory in operation," *id.* at 431, because they "operate as 'built-in headwinds' for [protected] groups and are unrelated to measuring job capability," *id.* at 432. *See also City of Jackson*, 544 U.S. at 234 (plurality opinion) (same under ADEA).[5]

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value," Br. 18, and therefore "warrants less suspicion," *id.* at 22. *See also* Chamber of Commerce Br. 8-11.

[4] *See, e.g., Watson*, 487 U.S. at 988 ("This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent."); *Wards Cove*, 490 U.S. at 645-46 (noting that under disparate impact theory "a facially neutral employment practice may be deemed violative of Title VII *without evidence* of the employer's subjective intent to discriminate . . . ." (emphasis added)).

[5] For this reason, respondents also miss the mark when they assert that petitioners' interpretation is "functionally at odds" with the RFOA provision because a plaintiff who has proven "pretext" at final stage of *Wards Cove* has established

3. The purpose of the RFOA provision thus is not to negate the "because of age" requirement in Section 4(a)(2). If the plaintiff fails to establish that the action is "because of age" – either by showing intentional discrimination in a disparate treatment case, or by showing that a practice affects older workers disproportionately because of their age in a disparate impact case – the RFOA provision is simply inapplicable "since there would be no liability under § 4(a)." *Id.* at 238-39. The provision instead "plays its principal role" when the plaintiff has proven a disparate impact in violation of Section 4(a)(2), by establishing that an employer's practices have an unjustified disparate impact on workers "because of" their age. *Id.* at 239. And in such circumstances, it is not enough for the employer to show that the treatment was based on a nonage factor. Instead, the RFOA provision "preclud[es] liability if the adverse impact was attributable to a nonage factor *that was 'reasonable.'*" *Id.* (emphasis added); *compare* Chamber of Commerce Br. 10 (omitting italicized phrase from quotation).

Accordingly, in raising an RFOA defense, the defendant is not simply saying "not so" to the plaintiff's allegation that its practices violate Section 4(a)(2). It is saying, "*even if so*, the practice is nonetheless reasonable and therefore exempt from liability." *Contra* Chamber of Commerce Br. 8-9. And that is the classic claim of an affirmative defense.

4. Stripped of its purported textual hook, respondents' argument reduces to the simple

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intentional discrimination. Br. 27-28. Proof of disparate impact under *Wards Cove* does not establish intentional discrimination, nor is it designed to.

assertion that given the differences between age and other forms of discrimination, Congress could not have intended to define the unlawful employment practice set forth in Section 4(a)(2) in accordance with the same *Wards Cove* test that governed Title VII claims. That assertion is unsupported as well.

Congress was well aware of the differences between age and other forms of discrimination. *See City of Jackson*, 544 U.S. at 240-41. But rather than leave it to the courts to decide for themselves how those differences should affect the elements and burdens of an ADEA case, Congress created "[t]wo textual differences between the ADEA and Title VII" to ensure that "the scope of disparate-impact liability under the ADEA is narrower than under Title VII." *Id.* at 240.

"The first is the RFOA provision," *id.*, which is unavailable to any other employment discrimination defendant. As discussed in petitioners' opening brief, that defense provides substantial protection for employers. Pet. Br. 35-36.

In addition, Congress responded to the differences between age and other kinds of discrimination by adjusting the burdens of proof under *Wards Cove* to ensure that age discrimination plaintiffs bear a greater burden than Title VII plaintiffs before an employer's conduct is deemed presumptively unlawful. 544 U.S. at 240 (citing Civil Rights Act of 1991, 105 Stat. 1071). Congress accomplished this by *lowering* the bar for Title VII plaintiffs in the Civil Rights Act of 1991 while leaving in place the *Wards Cove* burdens for claims under the ADEA. *Id.* It would be inappropriate for this Court, based on precisely the same policy considerations, to judicially impose yet a further modification of the *Wards Cove*

test by *raising* the bar for ADEA plaintiffs while leaving the current standard in place under Title VII.

Congress's accommodation is entirely reasonable. Importantly, petitioners do *not* claim that showing that a practice has a "statistical adverse impact on older workers," Br. 22, is sufficient grounds to shift the burden to the employer to defend the reasonableness of its actions. Instead, in our view, the burden shifts only after the plaintiff has also established that the employer could have avoided the impact by adopting an equally effective alternative practice, but chose not to. That showing is by no means easy, and many disparate impact claims founder upon it. But when that showing *is* made, there is every reason to believe that Congress would have thought that a practice that *unnecessarily* imposes substantial burdens on the employment opportunities of older workers should be presumptively illegal and a basis for liability if the employer cannot show that the practice is even *reasonable*. And it is not difficult to believe that, having provided employers a quite capacious defense, Congress would require the employer to make the modest showing required to obtain its protection.

II. The Text Of The ADEA Establishes The RFOA Provision As An Affirmative Defense.

Even if respondents' policy arguments were more persuasive, they would not overcome the clear contrary implications of the statutory text.

A. In Establishing The RFOA Provision As An Exception To The General Prohibition In Section 4(a)(2), Congress Used The Traditional Formulation Of An Affirmative Defense.

Petitioners' opening brief explained that this Court has consistently determined whether a statutory provision establishes an affirmative defense by looking first and foremost to the text of the statute itself, applying the "general rule" that "the burden of proof is on . . . [the] one [who] claims the benefits of an exception to the prohibition of a statute." *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967); *see* Pet. Br. 21-23.

Respondents briefly assert that because Section 4(f)(1) applies to conduct that is "*otherwise* prohibited" – instead of simply "prohibited" – it does not create an exemption from liability. Br. 32-33. But the phrase "otherwise prohibited" is a common idiom, easily understood to refer to conduct that would otherwise violate the Act unless falling within the exemptions that follow.

That Congress intended the "otherwise prohibited" language to signify an exemption from liability is illustrated by the very different formulation it used in Section 4(f)(3). That provision states that "[i]t shall not be unlawful for an employer . . . to discharge or otherwise discipline an individual for good cause." 29 U.S.C. § 623(f)(3). The exclusion of the "otherwise prohibited" language is understandable because subsection (f)(3) simply restates what was already implicit in the statute – terminations for cause are neither intentional age discrimination nor a conceivable basis for a successful

disparate impact claim. And it shows that Congress was, indeed, being careful with the language that it used in setting forth the affirmative defenses elsewhere in the statute.

B. The Decision In *Betts* Confirms That Exceptions To Liability Are Treated As Affirmative Defenses Absent Strong Indications Of A Contrary Legislative Intent.

Respondents reply that even if the RFOA provision is structured as an exemption from liability, that is no ground for treating it as an affirmative defense, citing to this Court's decision in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989). Br. 30. But that decision "cannot bear the weight [respondents] assign it." *Id.*

In *Betts*, the Court considered Section 4(f)(2) of the ADEA, which at the time provided in relevant part that

> It shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . because of the age of such individual.

29 U.S.C. § 623(f)(2) (1988).

The Court acknowledged that this language "appears on first reading to describe an affirmative defense." *Betts*, 492 U.S. at 181. The Court had reached the same conclusion with respect to the parallel provision of Title VII in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989). Indeed, in *Lorance* the Court acknowledged that it had

construed the same formulation as establishing an affirmative defense in the case of bona fide occupational qualifications. *Id.*

But the most natural construction of the language and structure of the statute was overcome by strong counter-indications of legislative intent.[6] The legislative history of the ADEA showed that Congress recognized that seniority systems implicate especially strong reliance interests that federal civil rights statutes should not lightly disturb. *Betts*, 492 at 178-79;[7] *see also Lorance*, 490 U.S. at 904 (reaching same conclusion with respect to Title VII); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 76-77 (1982). The legislative history also showed that Congress likewise understood that "'all retirement plans necessarily make distinctions based on age,'" *Betts*, 492 at 177-78 (citation omitted), and decided that "'the age discrimination law is not the proper place to fight' the battle of ensuring 'adequate pension benefits for older workers,'" *id.* at 179 (quoting 113

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[6] Of course, Congress subsequently overruled the result in *Betts* by amending Section 4(f)(2) to expressly place the burden of proof on employers. *See* Pet. Br. 43-44. As respondents acknowledge, this explains why the burden of proof is expressly addressed in Section 4(f)(2) but not 4(f)(1). Resp. Br. 46. Accordingly, no negative inference can be drawn from the fact that Section 4(f)(2) expressly places the burden of proof on the employer, while Section 4(f)(1) is silent on the question, as shown by the fact that this Court has already construed the BFOQ clause of Section 4(f)(1) as an affirmative defense. Pet. Br. 27.

[7] Section 703(h) of Title VII has a similar legislative history. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758-62 (1976).

Cong. Rec. 7,076 (1967) (statement of Sen. Javits, sponsor of the amendment creating Section 4(f)(2))).[8]

Respondents have pointed to no comparable counter-indications of legislative intent in the text or legislative history of the ADEA with respect to the catch-all RFOA defense.

C. Other Textual Cues Confirm That Congress Intended The Courts To Give The Language Of The RFOA An Ordinary Interpretation As An Affirmative Defense.

Finally, respondents have offered no adequate response to petitioners' demonstration that other aspects of the text of the ADEA confirm that Congress intended the RFOA to be given the interpretation its language and structure would ordinarily require.

Respondents do not contest that the RFOA provision is sandwiched between two other affirmative defenses, the BFOQ and the foreign law exceptions. Br. 31-32. Although respondents explain in some detail the uncontested point that the various defenses play different roles under the statute, they offer no explanation as to why Congress would have set out all three exemptions as neighboring clauses in the same sentence, yet expect the courts to divine its intention that one of the three really modified the definition of an unlawful employment practice while the other two provided affirmative defenses to the

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[8] *Betts* is also distinguishable because the text of the RFOA provision points much more strongly toward an affirmative defense than did Section 4(f)(2) as it stood at the time. *See* Pet. Br. 42 n.28 (noting provision did not contain exemption-emphasizing "otherwise prohibited" language).

unlawful employment practice defined separately elsewhere in the statute. Indeed, respondents have pointed to no other statute in which Congress has done anything of the sort.

Likewise, while there are undoubtedly differences between the Equal Pay Act and the ADEA, it is hard to imagine that Congress would have thought that it was doing anything other than establishing an affirmative defense when it adopted the language of another affirmative defense to provide an exemption from liability in a parallel employment discrimination statute. *See City of Jackson*, 544 U.S. at 233.

III. Respondents' Policy-Based Criticisms Of Petitioners' Interpretation Are Misplaced.

Respondents' other policy objections to a plain reading of the RFOA provision are equally meritless.

1. Implementing the RFOA as an affirmative defense is not "unworkably complex." Br. 26-27. It simply requires that the jury conduct the traditional *Wards Cove* analysis (which has not proven unworkable in Title VII cases) and, if satisfied, determine whether the practice is nonetheless reasonable (which respondents would require them to decide in any event).

This Court rejected an argument similar to respondents' in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There, the Court held that in a mixed motive case, the plaintiff bears the burden of proving that the defendant took sex into account when taking an adverse employment action, at which point the employer may, as an affirmative defense, avoid liability by proving that it would have taken the same

action anyway. *Id.* at 246. Although both questions center on the employer's intent, the Court rejected the defendant's assertion that because the plaintiff bore the burden of proving she was discriminated against "because of" her sex, she should also bear the burden of disproving the employer's assertion that it would have taken the same action even if it had not considered her sex. *Id.* at 246-47. The Court likewise rejected the claim, echoed here, that adding an affirmative defense to the already-complex *McDonnell-Douglas* burden-shifting regime would prove unworkably complex. "The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. Juries long have decided cases in which defendants raised affirmative defenses." *Id.* at 247 (internal cross-reference omitted).

2. Respondents further argue that considerations of "access to information" and the likelihood of unreasonableness weigh in favor of placing the RFOA burden of proof on plaintiffs. Br. 34-35. But their observation that informational disadvantages can be reduced by assigning the defendant the burden of production and permitting discovery, applies to every case in which courts have found that the defendants' access to information supports placing the burden of proof on the defendant. Nor are such measures an adequate substitute in this context. *See* Pet. Br. 33-34 & n.20; AARP Br. 20-25.

Moreover, the question is not whether it is an "uncommon occurrence" for reasonable employment practices to have "a statistical adverse impact on older workers." Br. 35. The question is whether Congress would have thought that employment practices that fail the entirety of the *Wards Cove* analysis – *i.e.*, cases in which a plaintiff has shown

both disparate impact *and* that the defendant has forgone equally effective alternatives – are likely enough to be unreasonable that it should fall upon the employer to prove the reasonableness of its actions. And there is every reason to believe that Congress would have thought so, particularly in light of the fact that it had provided that such a showing is sufficient to *conclusively* establish liability under Title VII.

3. Finally, respondents' amici claim at some length that reading the statute as petitioners propose will create all manner of harms on employers, the economy, and the national education system. Such claims are baseless. It is undisputed that reasonable business practices are exempt from disparate impact liability under the ADEA. The only question here is which party bears the risk of non-persuasion when the evidence of reasonableness balances in complete equilibrium. "In truth, however, very few cases will be in evidentiary equipoise." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58 (2005). And while it is not difficult for lawyers to hypothesize that an unfavorable outcome in this, or any other case, will have incentive effects in the real world, it is difficult to believe – and amici provide no concrete evidence to suggest – that employers will adjust their practices depending on the answer to the technical question in this case. In any event, if the text of the statute requires a rule employers find disadvantageous, their complaint is with Congress, from whom they may seek relief.

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As Justice Scalia has explained, the Court's "highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work

the people's will." *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting). The Congress that enacted the RFOA provision as an exemption from liability for "otherwise prohibited" conduct had every reason to expect that the courts would construe it as they had many other similarly formulated affirmative defenses. Respondents, on the other hand, invite the Court to treat the burden of proof question as a matter of policy judgment for the courts upon which the text of the statute has little bearing. That approach risks not only misconstruing the statute at hand, but also "poison[ing] the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning." *Id.*

IV. Any Ambiguity Should Be Resolved By Deferring To The EEOC's Reasonable Construction Of The Act.

In petitioners' view, the statute unambiguously establishes the RFOA provision as an affirmative defense. But if this Court disagrees, it should defer to the reasonable and persuasive views of the EEOC.

A. The EEOC's Conclusion That The RFOA Provision Creates An Affirmative Defense Is Entitled To *Chevron* Deference If The Text Of The Statute Does Not Resolve The Question.

There is no question that in the "authoritative view" of the EEOC, the RFOA provision is an affirmative defense. *Christensen v. Harris County*, 529 U.S. 576, 591 (2000) (Scalia, J., concurring in part and concurring in the judgment); *see* U.S. Br. 11-12. Nor is there any doubt that the Commission

construes its notice-and-comment regulations as embodying that position. *Id.* at 11. The only dispute is over the level of deference that position deserves, which is ultimately immaterial because the Commission's interpretation is not only reasonable, but entirely persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Nonetheless, respondents' reasons for withholding *Chevron* deference are unconvincing.

First, respondents argue that the EEOC's construction of its own regulation is unreasonable because 29 C.F.R. § 1625.7(e) does not apply to cases of disparate impact. They point out that the regulation speaks of "individual claims of discriminatory treatment," language that connotes first and foremost disparate treatment claims. But the term "discriminatory treatment" is broad enough to encompass all the forms of discrimination the ADEA prohibits, including both disparate treatment and adverse impact. And elsewhere in its regulations, when the Commission meant to speak solely of disparate treatment it used the term of art "disparate treatment" not the broader and more generic phrase "discriminatory treatment." *See, e.g.*, 29 C.F.R. § 1607.11; *id.* § 1608.4(a); *id.* § 1630.15(a); *see also* Chamber of Commerce Br. 29 (acknowledging that "'disparate treatment'" is "a term of art in civil rights law").[9]

Thus, although the regulation is not a model of clarity, it bears the reasonable interpretation the

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[9] The reference to "individual claims" may simply indicate that the EEOC did not intend to address collective actions involving pattern and practice claims, which are subject to their own separate burden-shifting regime. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 & n.46 (1977).

EEOC gives it. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). And as a result, there is no basis for respondents' assertion that the interpretation is not entitled to deference because it varies substantively from the Department of Labor's prior construction or the EEOC's proposed clarification (which, respondents fail to mention, is expressly intended to "reiterate the Commission's longstanding position that the RFOA provision creates an affirmative defense that the employer must establish," 73 Fed. Reg. 16,807, 16,808 (Mar. 31, 2008)). *See* App. (full text of notice).

Second, this Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007), makes clear that the agency did not forfeit the right to *Chevron* deference by labeling its notice-and-comment regulations "interpretations." *Contra* Resp. Br. 40-41. Here, Congress delegated the EEOC broad authority to construe the substance of the ADEA through rulemaking. *See* 29 U.S.C. § 628. The regulations it promulgated fall within that authority, *see id.*, and were issued through the notice-and-comment machinery of substantive rulemaking, *see* 46 Fed. Reg. 47,724, 47,727 (1981); *Long Island Care at Home*, 127 S. Ct. at 2350. Thus, there is no reason to believe that the EEOC "intended its . . . regulation to carry no special legal weight." *Id.* Moreover, as respondents' policy-filled brief illustrates, the legal issue in this case turns in significant part on a balancing of conflicting policy interests, upon which the agency has special expertise. *See Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008); *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990); *cf. also* 29 U.S.C. § 628 (giving EEOC authority to issue regulations "establish[ing] such reasonable exemptions to and from any or all

provisions of this chapter as it may find necessary and proper in the public interest").

Third, the nature of the RFOA provision is a question of substantive law, not courtroom procedure.[10] *Contra* Resp. Br. 42. That an agency's view on the meaning of a statute may have an incidental effect on the administration of judicial proceedings does not render it an illegitimate attempt to "bootstrap [the agency] into an area in which it has no jurisdiction." *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (citation omitted).

B. If The Court Concludes That The RFOA Provision Substitutes For The "Business Necessity" Test, It Should Defer To The EEOC's Position That The Defendant Bears The Burden Of Proof On Reasonableness Once The Plaintiff Establishes A Statistical Disparate Impact.

In petitioners' view, the statute unambiguously establishes the RFOA provision as an affirmative defense and requires plaintiffs to satisfy the full *Wards Cove* test as part of their case-in-chief. If, however, this Court disagrees and concludes, as urged by respondents and the EEOC, that the *Wards Cove* analysis should be modified to incorporate

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[10] *Cf., e.g., Am. Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994) ("For many years, [the burden of proof] has been viewed as a matter of substance.") (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942) (stating that the right of the plaintiff to be free of the burden of proof "inhered in his cause of action" and "was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure")).

considerations of reasonableness, the EEOC's position provides the best possible reading of the statute.

Respondents complain that the EEOC's position "relieves plaintiffs of the burden of proving discrimination," because employees are required to meet only the first step of the *Wards Cove* analysis before the burden of persuasion on reasonableness shifts to the employer. Br. 28. But respondents themselves insist that the traditional *Wards Cove* analysis does not describe the unlawful employment practice defined in Section 4(a)(2). Br. 23-24. If the Court accepts respondents' invitation to abandon the traditional meaning of the words of that provision, as set forth in the *Wards Cove* test, respondents can hardly complain that the EEOC's construction adheres only partially to the prior formulation.

Moreover, it is important to bear in mind that the differences between respondents' and the EEOC's views are really quite minor. Both agree that once the plaintiff has shown a substantial disparate impact because of age, the burden of production shifts to the employer to articulate a reasonable basis for its practice and to come forward with evidence in support of that assertion. Resp. Br. 35; U.S. Br. 9-10. The only difference is in their views over which side then bears the risk of non-persuasion in the unusual case in which the evidence regarding reasonableness is completely in equipoise. On that question, the text of the statute still controls and, for all the reasons described above, that text and the agency's reasonable interpretation of it compel the conclusion that the employer bears the burden of proving reasonableness.

Finally, respondents are simply wrong in asserting that under the Commission's construction of the statute, the scope of disparate impact liability is broader under the ADEA than it is under Title VII. While the employer may be somewhat disadvantaged in bearing the risk of non-persuasion, the breadth of the reasonableness defense more than "make[s] up for the disadvantage of" being assigned the burden of persuasion. Br. 29. After all, the broader defense benefits defendants in every ADEA case, while the burden of persuasion matters only when the evidence is in equipoise.

V. The Court Should Not Reach Respondents' Alternative Grounds For Affirmance.

If the Court finds that the RFOA provision establishes an affirmative defense, it should either find that respondents have waived the defense and order entry of judgment on the jury's verdict, or remand for further proceedings.

A. Respondents Forfeited Their Affirmative Defense By Abandoning It Before Trial.

Respondents argue that a party cannot be faulted for failing to assert an affirmative defense at trial when the defense was foreclosed by circuit precedent at the time. Petitioners do not dispute that point in principle, but it does not apply to this case, for two reasons.

First, nothing in the law of the Second Circuit foreclosed defendants from raising the RFOA provision as an affirmative defense. The one case respondents cite (Br. 20 n.54), *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999), simply held that a

plaintiff sustains her burden of proof in an ADEA disparate impact case by meeting the requirements of *Wards Cove*. *See id.* at 365. It said nothing about whether a defendant may yet prevail by interposing an RFOA affirmative defense. *Id.*; *see also, e.g., N.Y. 10-13 Ass'n, Inc. v. City of New York*, No. 98-Civ-1425, 2000 WL 1376101, at *10 (S.D.N.Y. Sept. 22, 2000) (dismissing ADEA disparate impact claim post-*City of Jackson* on the basis of the RFOA provision). Moreover, although the EEOC regulations may have misstated what was required to establish an RFOA defense, Br. 54 n.20, they said nothing to excuse a defendant from having to raise it.[11]

Second, even if respondents were entitled to some relief from their waiver because of intervening precedent, at most they would be entitled to a new trial, not to the opportunity to assert a right to judgment as a matter of law on the basis of a defense they never advanced and the jury never heard.[12] Because defendants did not raise reasonableness at trial, petitioners had no reason to develop any evidence on the subject or to vigorously challenge the evidence of reasonableness respondents put on. After all, respondents did not dispute that plaintiffs would

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[11] Respondents cannot plausibly claim to have relied on those regulations in any event, as they were simultaneously arguing below that the regulations were wrong to recognize a disparate impact claim in the first place. *See* Pet. App. 43a.

[12] Respondents say that it was plain error for the district court to fail to put the RFOA defense before the jury. Br. 54 n.20. But it is never error (much less plain error) for a trial court to decline to instruct a jury on an affirmative defense the defendant has abandoned. And, in any case, the remedy for an erroneous jury charge is a new trial, *see, e.g., Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 809 (2007), which respondents do not seek.

be entitled to prevail so long as they proved that the current practice – reasonable or not – had a disparate impact and that there were other equally effective alternatives. Indeed, for this reason, even if the Court accepts respondents' interpretation of the statute, the Court should vacate the decision below and remand for a new trial.

Respondents, however, have not asked for a new trial. And because they are not entitled to the relief they do seek, the Court should reverse and remand for restoration of the jury verdict in petitioners' favor.

B. This Court Should Not Decide In The First Instance Whether Respondents' Practices Were Reasonable As A Matter Of Law.

In the petition for certiorari, petitioners asked this Court to decide whether respondents' practices "constituted a 'reasonable factor other than age' as a matter of law." Pet. i (Second Question Presented). Among other things, petitioners argued that granting review would allow the Court to resolve outstanding legal confusion over the RFOA's reasonableness standard, including "whether the reasonableness analysis takes into account the degree of disparate impact caused by the defendant's chosen practice and the availability of alternatives . . . ." Pet. 28.

Respondents opposed, and this Court denied, certiorari on that question. Respondents now attempt to reintroduce that question into this case, asking the Court to decide whether their conduct was reasonable as a matter of law "regardless of who bears the burden." Resp. Br. i (Second Question Presented). This Court should deny that request.

Because respondents successfully opposed certiorari on the reasonableness question, petitioners did not address the necessary factual and legal questions in their opening brief, and lack the space to address them adequately now. At the same time, the denial has deprived this Court of the benefit of briefing on the question by the EEOC and the Solicitor General.

Moreover, this case is quite different from *City of Jackson*. There, the Court had no need to consider in detail the content of the reasonableness requirement, as the defendant's practice was "unquestionably reasonable." 544 U.S. at 242. Here, the closeness of the reasonableness question is what required the Second Circuit to decide the burden of proof question in the first place. Indeed, although petitioners did not focus at trial on the reasonableness of respondents' practices, they did show that respondents were, or should have been, aware that the broad delegation of discretion to front-line managers risked discrimination against older workers; that the "startlingly skewed results" of that discretionary process put them on notice that the theoretical risk was, indeed, quite real; and that respondents failed to implement even the basic safeguards they themselves had identified as reasonable measures to guard against discrimination in the IRIF process. Pet. Br. 7-11. The district judge, who heard all of the evidence, upheld the jury's finding of a *willful* violation of the ADEA by concluding that "[t]he jury was entitled to infer from [the] evidence that KAPL was motivated to disregard the disparate impact of the IRIF on older employees by its desire to hire new and younger employees." Pet. App. 100a.

D. The Court Should Not Entertain Respondents' Other Fact-Bound And Meritless Objections To The Decision Below.

Even less worthy of review is respondents' meritless and fact-bound challenge to the Second Circuit's *Wards Cove* analysis.

There is no basis for this Court to review the court of appeals' determination that petitioners adequately put before the jury the theory that "KAPL's 'unaudited and heavy reliance on subject assessments of 'criticality' and 'flexibility' in implementing the IRIF" caused an unlawful disparate on older workers. Pet. App. 7a. The court of appeals explained the basis for that conclusion in detail in its first opinion. *Id.* at 57a-59a. Notably, respondents did not ask the trial court to instruct the jury that in deciding whether petitioners had identified a specific employment practice, they were limited to the practices identified by counsel in his summation and were required to disregard the expert testimony breaking down the elements of the IRIF process and identifying the disparate impact of the subjective elements of criticality and flexibility.

For the same reason, the court of appeals did not err – and any asserted error would be unworthy of this Court's attention – in finding sufficient evidence of an equally effective alternative practice different than the ones petitioners identified below. The jury instructions were broad enough to permit the jury to find for petitioners on the ground the Second Circuit identified and the respondents do not argue here that the evidence was insufficient to support it. Moreover, even if this Court concluded that the court of appeals should have limited itself to the alternatives

petitioners identified, that would simply put before this Court the question whether those alternatives were legally sufficient. While respondents have baldly asserted that they are not, they have provided no arguments or authorities to support that position. *See* Br. 55.

Accordingly, if the Court finds that respondents have not waived the RFOA defense, it should remand the case for further proceedings.[13]

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[13] If there is a remand, it may be appropriate to return the case to the district court to decide the reasonableness question in the first instance, and to decide, if necessary, whether a new trial would be more appropriate than judgment as a matter of law. *See* Fed. R. Civ. P. 50(b); *Weisgram v. Marley Co.*, 528 U.S. 440, 443-44 (2000).

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed or, in the alternative, vacated and remanded for further proceedings.

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April 14, 2008

APPENDIX

EEOC Notice Of Proposed Rulemaking

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1625
RIN 3046-AA76

Disparate Impact Under the Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission ("EEOC" or "Commission") is issuing this notice of proposed rulemaking ("NPRM") to address issues related to the United States Supreme Court's decision in *Smith v. City of Jackson*. The Court ruled that disparate impact claims are cognizable under the Age Discrimination in Employment Act ("ADEA") but that liability is precluded when the impact is attributable to a reasonable factor other than age. Current EEOC regulations interpret the ADEA as prohibiting an employment practice that has a disparate impact on individuals within the protected age group unless it is justified as a business necessity.

DATES: Comments must be received on or before May 30, 2008. The Commission will consider any

comments received on or before the closing date and thereafter adopt final regulations. Comments received after the closing date will be considered to the extent practicable.

* * *

SUPPLEMENTARY INFORMATION: In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the United States Supreme Court held that the ADEA authorizes recovery for disparate impact claims of discrimination. This holding validated the Commission's longstanding rule that disparate impact analysis applies in ADEA cases. The Court also held that the "reasonable factors other than age" ("RFOA") test, rather than the business-necessity test, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals. This ruling differs from the EEOC's position that an employment practice that had a disparate impact on individuals within the protected age group could not be a reasonable factor other than age unless it was justified as a business necessity. The Commission proposes to amend its regulation to reflect the Supreme Court's decision.

Smith v. City of Jackson

The *Smith* plaintiffs, senior police and public safety officers, alleged that the defendant City's pay plan had a disparate impact on older workers because it gave proportionately larger pay increases to newer officers than to more senior officers. Older officers, who tended to hold senior positions, on average received raises that represented a smaller percentage of their salaries than did the raises given to younger officers. The City explained that, after a survey of

salaries in comparable communities, it raised the junior officers' salaries to make them competitive with those for comparable positions in the region. 544 U.S. at 241-42.

The Fifth Circuit Court of Appeals dismissed the plaintiffs' disparate impact claim on the ground that such claims "are categorically unavailable under the ADEA." *Id.* at 231. The Supreme Court disagreed and ruled that plaintiffs may challenge facially neutral employment practices under the ADEA. *Id.* at 233-40. The Court also ruled, however, that the "scope of disparate-impact liability under the ADEA is narrower than under Title VII" of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[14] 544 U.S. at 240.

In holding that disparate impact claims are cognizable under the ADEA, the Supreme Court relied in large part on the parallel prohibitory language and the common purposes of the ADEA and Title VII. *Id.* at 233-40. *Accord McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) (statutes share "common substantive features" and "common purpose: 'the elimination of discrimination in the workplace'") (quoting *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). The Court noted that, in passing the ADEA, Congress was concerned that application of facially neutral employment

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[14] Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court first recognized the disparate impact theory of discrimination under Title VII. The Court held that Title VII prohibits not only intentional discrimination but also employment practices that, because they have a disparate impact on a group protected by Title VII, are "fair in form but discriminatory in operation." *Id.* at 431.

standards, such as a high school diploma requirement, may "unfairly" limit the employment opportunities of older individuals. 544 U.S. at 235 n.5 (quoting Report of the Sec'y of Labor, The Older American Worker: Age Discrimination in Employment 3 (1965), *reprinted in* U.S. EEOC, Leg. History of the ADEA 21 (1981)) ("Wirtz Report"). The Court observed that there is a "remarkable similarity between the congressional goals" of Title VII and "those present in the Wirtz Report." 544 U.S. at 235 n.5.

At the same time, however, the Court identified two key textual differences that affect the relative scope of disparate impact liability under the two statutes. First, the ADEA contains the RFOA provision, which has no parallel in Title VII and precludes liability for actions "otherwise prohibited" by the statute "where the differentiation is based on reasonable factors other than age."[15] *Id.* at 240. Second, in reaction to the decision in *Wards Cove Packing Co. v. Atonio*,[16] which "narrowly construed the employer's exposure to liability on a disparate-impact

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[15] The Court found that the presence of the RFOA provision supported its conclusion that disparate impact claims are cognizable under the ADEA. 544 U.S. at 238-40. The RFOA provision "plays its principal role" in disparate impact cases, where it "preclud[es] liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" *Id.* at 239. Comparing the RFOA provision with the Equal Pay Act provision that precludes recovery when a pay differential is based on "any other factor other than sex," 29 U.S.C. 206(d)(1), the Court found it "instructive" that "Congress provided that employers could use only *reasonable* factors in defending a suit under the ADEA." 544 U.S. at 239 n.11 (emphasis in the original).

[16] 490 U.S. 642 (1989).

theory," Congress amended Title VII but not the ADEA. 544 U.S. at 240 (citing the Civil Rights Act of 1991, sec. 2, 105 Stat. 1071). Accordingly, "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240.[17]

Applying its analysis, the Court rejected the *Smith* plaintiffs' disparate impact claims on the merits. The Court ruled that the plaintiffs failed to satisfy *Wards Cove*'s requirement that they identify a "specific test, requirement, or practice within the pay plan that has an adverse impact on older workers." *Id.* at 241.

In addition, focusing on the plan's purpose, design, and implementation, the Court found that the City's pay plan was based on reasonable factors other than age. The Court noted that the City grouped officers by seniority in five ranks and set wage ranges based on salaries in comparable communities. Most of the officers were in the three lowest ranks, where age did not affect officers' pay. In the two highest ranks, where all of the officers were over 40, raises

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[17] The "identical" language is in section 703(a)(2) of Title VII (42 U.S.C. 2000e-2(a)(2)) and section 4(a)(2) of the ADEA (29 U.S.C. 623(a)(2)), which make it unlawful for employers "to limit, segregate, or classify" individuals in a manner that would

> deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's [protected status].

The language of the two statutes significantly differs, however, with regard to the applicable defense. Unlike the ADEA, which provides a defense when the practice is based on a reasonable factor other than age (29 U.S.C. 623(f)(1)), Title VII provides a defense only when the practice is job related and consistent with business necessity (42 U.S.C. 2000e-2(k)(1)(A)).

were higher in terms of dollar amounts; they were lower only in terms of percentage of salary. The Court concluded that the plan, as designed and administered, "was a decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers." *Id.* at 242.

Finally, the Court noted that, although "there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable." Unlike Title VII's business necessity defense, which requires the employer to use the least discriminatory alternative, "the reasonableness inquiry includes no such requirement." *Id.* at 243.

Revisions to Agency Regulations

The Commission proposes to revise current paragraph 1625.7(d) to state that an employment practice that has an adverse impact on individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age" (RFOA). This revision reflects the Supreme Court's conclusion that disparate impact claims are cognizable under the ADEA and that the RFOA test, rather than the business-necessity test, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals.

The proposed revision also states that the individual challenging the allegedly unlawful employment practice bears the burden of isolating and identifying the specific employment practice responsible for the adverse impact. As the Supreme Court stressed in *Smith*, "it is not enough to simply allege that there is a disparate impact on workers, or

point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'"[18]

The Commission proposes to revise current paragraph 1625.7(e) to state that, when the RFOA exception is raised, the employer has the burden of showing that a reasonable factor other than age exists factually. This section reiterates the Commission's longstanding position that the RFOA provision creates an affirmative defense that the employer must establish.[19]

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[18] *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (quoting *Wards Cove*, 490 U.S. at 656) (emphasis in *Smith*).

[19] Until recently, most courts treated RFOA as an affirmative defense. *See, e.g., Enlow v. Salem-Keizer Yellow Cab Co., Inc.* 389 F.3d 802, 807-08 (9th Cir. 2004) (in the context of a disparate treatment claim, characterizing the RFOA as an affirmative defense and holding that it was unavailable where the challenged practice is based on age), *cert. denied*, 544 U.S. 974 (2005); *E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1541 (2d Cir. 1996) (same), *cert. denied*, 522 U.S. 808 (1997). However, the Second and Tenth Circuits have recently concluded that defendants bear only the burden of production, not the burden of persuasion, on the issue. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 141-43 (2d Cir. 2006), *cert. granted*, 76 U.S.L.W. 3391 (U.S. Jan. 18, 2008) (No. 06-1505); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006). *But see Meacham*, 461 F3d at 147-53 (Pooler, J., dissenting) (RFOA is an affirmative defense). The court in *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980 (E.D. Mo. 2006), *certification for interlocutory appeal on other grounds granted*, 2007 WL 38675 (E.D. Mo. Jan. 4, 2007), did not analyze the issue but followed the lead of *Pippin* and *Meacham* to conclude that the defendant did not bear the burden of proof. For the reasons explained in the text and accompanying footnotes, the

Requiring the employer to bear the burden of proof is consistent with the language and structure of the ADEA. The RFOA provision is found in section 4(f)(1) of the ADEA, which states that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited [by the ADEA] where age is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). Since the employer indisputably bears the burden of proving BFOQ,[20] the most natural construction of section 4(f)(1) as a whole is that the employer similarly bears the burden of proving RFOA. In addition, when Congress enacted the Older Workers Benefit Protection Act ("OWBPA") amendments to the ADEA in 1990, it specifically stated that the employer bears the burden of proof on the RFOA affirmative defense in section 4(f)(1). S. Rep. No. 101-263, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1509, 1535 (noting that Congress was incorporating into section 4(f)(2) "the language of [section] 4(f)(1) that is commonly understood to signify an affirmative defense"). This approach also is consistent with the allocation of burdens under the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1), which precludes liability when the employer establishes that a pay differential is "based on any other factor other than sex," 29 U.S.C. 206(d)(1)(iv).[21] The *Smith*

Commission disagrees with *Meacham* and *Pippin* and concludes that the RFOA burden of proof rests with the employer.

[20] *See Smith*, 544 U.S. at 233 n.3 (2005) (referring to the BFOQ provision as "an affirmative defense to liability").

[21] *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (shifting the burden of proof to the employer "is

Court did not need to discuss the burden of proof because the employer's actions were so eminently reasonable that it easily prevailed regardless of who bore the ultimate burden.

The Commission invites comments on these proposed changes from all interested parties. The Commission also invites comments on whether the regulations should address other matters concerning the application of the disparate impact theory of discrimination under the ADEA. In particular, the Commission would welcome comments on the following specific question:

1. Should the regulations provide more information on the meaning of "reasonable factors other than age"? If so, what should the regulations say? For example, should the regulations refer to tort law standards such as negligence and reasonable standard of care when addressing the meaning of "reasonable"? Should the regulations offer factors relevant to whether an employment practice is based on reasonable factors other than age? If so, what should those factors be?

* * *

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR chapter XIV part 1625 as follows:

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consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof").

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

1. The authority citation for part 1625 continues to read as follows:

Authority: 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary's Order No. 10-68; Secretary's Order No. 11-68; Sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 12, 29 U.S.C. 631, Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

SUBPART A—INTERPRETATIONS

2. Revise paragraphs (d) and (e) of § 1625.7 to read as follows:

§ 1625.7 Differentiations based on reasonable factors other than age.

* * * * *

(d) Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparities.

(e) Whenever the exception of "a reasonable factor other than age" is raised, the employer bears the burden of proving that the "reasonable factor other than age" exists factually.

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SUPREME COURT, U.S.

No. 06-1505

In the Supreme Court of the United States

CLIFFORD B. MEACHAM, ET AL., PETITIONERS

v.

KNOLLS ATOMIC POWER LABORATORY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an employee alleging disparate impact under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, bears the burden of persuasion on the "reasonable factors other than age" defense.

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INTEREST OF THE UNITED STATES

The question in this case is whether plaintiffs raising a disparate-impact claim under the Age Discrimination in Employment Act (ADEA or Act), 29 U.S.C. 621 *et seq.*, bear the burden of persuading the factfinder that the challenged employment practice is not based on "reasonable factors other than age" (RFOA), 29 U.S.C. 623(f)(1). The Equal Employment Opportunity Commission (EEOC) has responsibility for interpreting and enforcing the ADEA, and it has promulgated regulations concerning the allocation of the burden of proof with respect to the ADEA's RFOA provision. See 29 C.F.R. 1657(e) (discussed pp. 15-18, *infra*). The United States filed an amicus brief at the petition stage of this case at the invitation of the Court.

STATEMENT

1. Respondent Knolls Atomic Power Laboratory (KAPL) manages and operates a federally-owned research and development laboratory under contract with the Department of Energy. In 1996, in response to a government-imposed staffing limit, KAPL instituted an involuntary reduction in force (IRIF). Pet. App. 5a, 39a. To implement the IRIF, respondent instructed managers in units that were over-budget to rate their employees from 0 to 10 on three factors—performance, flexibility, and the criticality of their skills—and then add up to 10 points for years of service. After ranking employees based on their scores, managers were instructed to identify for layoff the lowest-ranked employees. *Id.* at 5a-6a, 40a. Pursuant to this procedure, 30 out of the 31 exempt employees selected for layoff were over 40 years old. *Id.* at 75a. At the time of the layoff, approximately 40% of the workforce was under age 40. *Id.* at 41a, 74a-75a.

To evaluate the results of the managers' selections, KAPL charged a review board with ensuring that the choices "adher[ed] to downsizing principles as well as minimal impact on the business and employees." Pet. App. 40a. The board did not, however, consider issues of age discrimination. *Id.* at 17a, 41a. KAPL's only analysis of the adverse impact of the layoff on older workers was a comparison of the average age of the workforce, before and after the IRIF. *Id.* at 17a, 40a-41a. Because the workforce comprised more than 2000 exempt employees, the average age was unlikely to be affected by loss of 31 employees of any age. *Id.* at 17a, 43a. KAPL's general manager and general counsel also reviewed the layoff lists by checking the math in the scoring and consulting with some managers to confirm that their decisions were "properly made" and "legiti-

mate." *Id.* at 17a-18a, 40a-41a (citation omitted). At the end of the process, all 31 employees selected for layoff received notices of termination. *Id.* at 40a-41a, 74a.

2. Petitioners are former KAPL employees who were laid off as a result of the IRIF. At the time of the layoff, all of the petitioners were over the age of 40. In 1997, they filed suit challenging their terminations under the ADEA and state law, alleging claims of both disparate treatment and disparate impact. Pet. App. 71a-72a. At trial, petitioners' expert testified both that the subjective criteria, "criticality" and "flexibility," were chiefly responsible for determining which employees would be laid off, and that the review procedures did not offer adequate protection to prevent managers' prejudices from influencing the outcome. *Id.* at 42a.

The jury was instructed that petitioners bore the ultimate burden of persuasion on their disparate-impact claims in accordance with the method of proof set forth in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), for disparate-impact claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, before its amendment in 1991. See Pet. Supp. C.A. Br. 7-8 & Exh. A. At the close of trial, the jury found for petitioners on the disparate-impact claims but for respondents on the disparate-treatment claims. Pet. App. 45a, 75a-76a; App. 62-75. The district court denied respondents' motion for judgment as a matter of law. Pet. App. 77a-102a, 153a.

3. The court of appeals affirmed. Pet. App. 33a-69a. The court analyzed the jury's disparate-impact verdict under the burden-shifting framework set out in *Wards Cove*. *Id.* at 54a-63a; see *id.* at 7a-8a. Under that framework, a plaintiff makes a prima facie case of disparate-impact discrimination by showing that a specific employ-

ment practice or policy had a significant disparate impact on a protected group. *Wards Cove*, 490 U.S. at 656-658. The burden then shifts to the employer to produce evidence of a business justification for the challenged practice. *Id.* at 659. Once such evidence is produced, the burden shifts back to the plaintiff to persuade the factfinder that the asserted business justification is merely a pretext for discrimination. The plaintiff may sustain that burden by showing that "other tests or selection devices, without a similarly undesirable [discriminatory] * * * effect, would also serve the employer's legitimate [business] interest." *Id.* at 660 (citation omitted). Under *Wards Cove*, the "ultimate burden of proving * * * discrimination * * * remains with the plaintiff *at all times*." *Ibid.*

Applying the *Wards Cove* framework to this case, the court of appeals held that petitioners adequately identified a specific employment practice—the "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility'" (Pet. App. 60a)—and proved that it caused a substantial adverse impact because of age. *Id.* at 59a. The court also determined that respondents offered a facially legitimate business justification for the IRIF: "to reduce [KAPL's] workforce while still retaining employees with skills critical to the performance of KAPL's functions." *Ibid.* (citation omitted). The court concluded that petitioners nevertheless prevailed at the final step of the *Wards Cove* analysis because "[a]t least one suitable alternative" practice was clear from the record: KAPL could have designed an IRIF with "tests for criticality and flexibility that were less vulnerable to managerial bias." *Id.* at 60a-61a & n.8.

Respondents petitioned for a writ of certiorari. In their petition, they sought review of the court of appeals'

conclusion that a disparate-impact claim is available under the ADEA as well as of the evidentiary basis for the verdict. While the petition was pending, this Court issued its decision in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), holding that disparate-impact claims are cognizable under the ADEA. Following that decision, the Court granted the writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded for further proceedings. 544 U.S. 957 (2005).

4. On remand, a divided panel of the Second Circuit vacated the judgment of the district court and remanded the case with instructions to enter judgment for respondents. Pet. App. 1a-32a.

The court of appeals concluded that the analysis it had employed in its earlier decision was now "untenable" because the *Smith* Court concluded that the "'business necessity' test" applicable in Title VII disparate-impact cases after 1991 "is not applicable in the ADEA context." Pet. App. 9a (citing *Smith*, 544 U.S. at 239, 243). Instead, the court explained, the "appropriate test [under *Smith*] is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals." *Ibid.* The court noted that the "reasonableness" test described in *Smith* "is derived primarily from" the provision of the ADEA stating that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where the differentiation is based on reasonable factors other than age," *i.e.*, the Act's RFOA provision. *Id.* at 9a-10a & n.4 (quoting 29 U.S.C. 623(f)(1)).

Turning to the issue of the burden of proof for "reasonableness," the court held that the "best reading of

the ADEA—in light of [*Smith*] and *Wards Cove*—is that the plaintiff bears the burden of persuading the fact-finder that any justification the employer proffers for its challenged practice is unreasonable." Pet. App. 11a. The court acknowledged that "[t]here is some force" to the view that the text of the ADEA places the burden of establishing an RFOA on the defendant. *Id.* at 13a. The court rejected that conclusion, however, based on three considerations apart from the statute's text: (1) that *Smith* "nowhere suggested" that defendants must prove the RFOA (*id.* at 11a-12a); (2) that "[a]ny other interpretation would compromise the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the 'legitimacy' of its business justification" (*id.* at 12a); and (3) that, because there may be a correlation between age and certain reasonable employment criteria, it "would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable" (*id.* at 12a-13a).

The court of appeals concluded that respondents met their burden of producing evidence of a legitimate business justification for the IRIF as well as the specific employment practice challenged by the plaintiffs. Pet. App. 15a. The court noted that respondents presented testimony that criteria such as flexibility and criticality were "ubiquitous components of 'systems for making personnel decisions,'" and that "the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Id.* at 16a.

By contrast, the court of appeals concluded, petitioners did not sustain their burden. The court noted that the reasonableness inquiry described in *Smith*, unlike

the business-necessity inquiry applicable in the Title VII context, does not ask "whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class." Pet. App. 16a (quoting *Smith*, 544 U.S. at 243). While "[t]here may have been other reasonable ways for [respondent] to achieve its goals," the court concluded that petitioners had not demonstrated that "the one selected" was "unreasonable." *Id.* at 19a (citations omitted).

Judge Pooler dissented. Pet. App. 21a-32a. In her view, the majority "improperly conflate[d] the analysis of proof of a [RFOA] with the legitimate business justification analysis [under *Wards Cove*]" and "err[ed] by assigning to plaintiffs the burden of proving that a RFOA does not exist." *Id.* at 21a. She explained that "existing cases, legislative history, and statutory structure overwhelmingly support the view that employers bear the burden of establishing a RFOA." *Id.* at 25a. In particular, she reasoned that Congress's inclusion of the RFOA provision among the ADEA's other exceptions to liability for actions "otherwise prohibited," including the exception for circumstances in which "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (BFOQ), 29 U.S.C. 623(f)(1), indicates that RFOA, like BFOQ, is an affirmative defense as to which the defendant bears the burden of proof. Pet. App. 26a-30a.

Judge Pooler suggested that, to establish an ADEA disparate-impact discrimination claim, plaintiffs must first establish that the employer's asserted business justification is merely a pretext for discrimination, pursuant to the "judicially crafted" *Wards Cove* framework. Once plaintiffs have discharged that burden, the burden shifts to the employer to prove under the RFOA's "stat-

utory exception to liability" that its practice is nevertheless based on "reasonable factors other than age." Pet. App. 24a-25a. In her view, nothing in *Smith* altered the burden of proof tied to the ADEA's RFOA provision, which is mandated by the "appropriate statutory analysis." *Id.* at 31a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that plaintiffs raising a claim of disparate-impact age discrimination under the ADEA bear the burden of persuading the factfinder that the adverse impact of the challenged employment practice was not based on a reasonable factor other than age.

The text and structure of the ADEA clearly indicate that the exception to liability for adverse effects "based on reasonable factors other than age," 29 U.S.C. 623(f)(1), is an affirmative defense to be established by the employer that asserts it. This Court has so interpreted the RFOA's neighboring exception to liability in cases in which age is a "bona fide occupational qualification," *id.*, as well as the similar exception for pay differentials "based on any other factor other than sex" under the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1). And well-established rules of statutory construction support the conclusion that Congress intended the RFOA provision to operate as an affirmative defense as well.

That plain meaning interpretation is supported by agency practice. The federal agencies responsible for enforcement of the ADEA have long interpreted the ADEA's RFOA provision as creating an affirmative defense to be established by the employer, and Congress has acknowledged and embraced that interpretation in later amendments to the statute. The agencies' long-

standing position that the employer bears the burden of persuasion with respect to the RFOA defense is reasonable and entitled to deference.

This Court's decision in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), does not compel a different result. *Smith* did not address the burden of proof under the ADEA's RFOA provision. Although *Smith* makes clear that the scope of disparate-impact liability under the ADEA is "narrower" than under Title VII, *id.* at 240, it does not follow from that holding that plaintiffs must bear the burden of proving that the adverse impact of a challenged employment practice is *not* based on reasonable factors other than age. In identifying the RFOA provision as the way in which the ADEA is narrower than Title VII, the Court in *Smith* in no way suggested that the provision should not be given its natural reading and effect as an affirmative defense. Thus, nothing in *Smith* requires that plaintiffs bear the burden of persuasion with respect to the RFOA provision.

ARGUMENT

THE ADEA ASSIGNS TO THE EMPLOYER THE BURDEN OF PERSUADING THE FACTFINDER THAT A PRACTICE WITH A DISPARATE IMPACT ON OLDER WORKERS IS BASED ON REASONABLE FACTORS OTHER THAN AGE

The question in this case concerns the proper allocation of the burden of persuasion in a disparate-impact age discrimination case in which the employer seeks to avoid liability by invoking the ADEA's exception for differential treatment of older workers that is "based on reasonable factors other than age," 29 U.S.C. 623(f)(1). It is undisputed that, once plaintiffs have demonstrated that a particular employment practice has a disparate impact on older workers, the employer who seeks to de-

fend that practice on the ground that the adverse impact was based on a reasonable nonage factor must assert that defense and bears the burden of *production* with respect to the defense. See Br. in Opp. 1-2. The question is whether the employer also bears the burden of *persuasion* with respect to that defense. See, *e.g.*, *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005) (describing historical distinction between burdens of production and burdens of persuasion).

The text and structure of the ADEA answer that question in the affirmative: The RFOA provision creates an affirmative defense to liability for actions "otherwise prohibited" by the statute, and therefore assigns to the employer the burden of persuasion. Moreover, the federal agencies responsible for interpreting and enforcing the ADEA have long interpreted the RFOA provision to allocate that burden to the employer. Thus, even if the statutory language were susceptible to different interpretations, the responsible agencies' interpretation is, at a minimum, reasonable and entitled to deference.

A. The Text And Structure Of The ADEA Make Clear That The RFOA Provision Is An Affirmative Defense As To Which The Defendant Bears The Burden Of Persuasion

1. Section 4(a)(2) of the ADEA makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(2). As the plurality explained in *Smith*, the language of Section 4(a)(2) "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer," such that "an

employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age." *Smith* v. *City of Jackson*, 544 U.S. 228, 236 & n.6 (2005) (plurality opinion). Section 4(a)(2) thus authorizes recovery for age discrimination on the "disparate impact" theory announced in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), for cases brought under Title VII, 42 U.S.C. 2000e *et seq.* See *Smith*, 544 U.S. at 232. As the plurality explained in *Smith*, a classification that adversely affects an employee because of that employee's age in violation of Section 4(a)(2) of the ADEA falls within "the very definition of disparate impact." *Id.* at 236 n.6 (plurality opinion).

The structure of the Act is telling. Section 4(a)(2) appears among a number of provisions that generally prohibit employment age discrimination with respect to workers at least 40 years old. 29 U.S.C. 623(a)-(c) and (e); see 29 U.S.C. 631. By contrast, Section 4(f), 29 U.S.C. 623(f), creates "exceptions" to those general prohibitions. S. Rep. No. 723, 90th Cong., 1st Sess. 9 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967). As relevant here, Section 4(f)(1)—the RFOA provision—provides that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited under subsections (a), (b), (c), or (e) * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1).

The most natural reading of Section 4(f) as a whole is that those exceptions for actions "otherwise prohibited" by the substantive discrimination provisions of the

ADEA, including the RFOA exception, constitute affirmative defenses that come into play after the plaintiff has established that the employer has taken action that would otherwise violate the Act. Indeed, in dictum, this Court has already generally characterized those provisions of the ADEA as "affirmative defenses." *TWA* v. *Thurston*, 469 U.S. 111, 122 (1985). And that squares with the background rule that "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); accord *Schaffer*, 546 U.S. at 57 ("[T]he burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions.").

Section 4(f)(1) therefore exempts the defendant from liability that it would "otherwise" incur only if it can persuade the factfinder that its actions were justified or excusable. As Judge Pooler observed, "[i]f plaintiffs were required to show that no RFOA existed, Congress logically would have included this provision within the liability sections, rather than within the exemption sections." Pet. App. 26a-27a. Congress's decision to place the RFOA provision with the statutory exemptions therefore has great significance when it comes to allocating the burden of persuasion with respect to that provision.

2. Consistent with that understanding, this Court has held that the RFOA provision's neighboring exception for actions "otherwise prohibited * * * where age is a bona fide occupational qualification" is an affirmative defense, see *Smith*, 544 U.S. at 233 n.3, to be established by the employer, see *Western Air Lines, Inc.* v.

Criswell, 472 U.S. 400, 416-417 & n.24 (1985)); cf. *International Union, UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (construing Title VII provision to require defendant to prove BFOQ). The courts of appeals have similarly characterized other exceptions in Section 4(f) as affirmative defenses. See, *e.g.*, *Jankowitz* v. *Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 651 (8th Cir. 2005) (voluntary early retirement incentive plan under 29 U.S.C. 623(f)(2)(B)(ii)); *Erie County Retirees Ass'n* v. *County of Erie*, 220 F.3d 193, 199 n.3 (3d Cir. 2000) (employee benefit plan under 29 U.S.C. 623(f)(2)(B)(i)). Congress's placement of the RFOA provision among those exemptions from liability for actions "otherwise prohibited" by the substantive liability provisions of the statute strongly indicates that the RFOA, too, is an affirmative defense as to which the employer bears the burden of persuasion. Cf., *e.g.*, *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps.").

3. This Court has likewise interpreted the similarly worded exception in another employment discrimination statute, the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d)(1), which "added to § 6 of the Fair Labor Standards Act of 1938 the principle of equal pay for equal work regardless of sex." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 190 (1974). The EPA creates an exception to liability similar to the ADEA's RFOA provision for differential pay "based on any other factor other than sex." 29 U.S.C. 206(d)(1); see also *Smith*, 544 U.S. at 239 n.11 (plurality opinion) (noting that the EPA's "any other factor" exception and the ADEA's RFOA exception are worded similarly, but that the RFOA exception is limited to "*reasonable* factors"). In *Corning Glass Works*, this Court interpreted that language to

establish an "affirmative defense on which the employer has the burden of proof." 417 U.S. at 196-197. The Court explained that, "while the Act is silent on this question, its structure and history * * * suggest that once the [plaintiff] has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." *Id.* at 196. Thus, in the EPA context, the Court treated al the statutory exceptions the same, *viz.*, as affirmative defenses. In addition, the Court observed that this construction was "consistent with the general rule that the application of an exception under the Fair Labor Standards Act is a matter of an affirmative defense in which the employer has the burden of proof." *Id.* at 196-197.

The EPA was enacted as an amendment to the Fair Labor Standards Act (FLSA) shortly before the ADEA was enacted, and Congress looked to the FLSA as a model in drafting a number of provisions of the ADEA. See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). "[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith*, 544 U.S. at 233 (plurality opinion) (citing *Northcross* v. *Board of Educ.*, 412 U.S. 427, 428 (1973) (per curiam)). Like the EPA, the ADEA assigns to employers the burden of establishing that otherwise unlawful actions are justified by factors other than discrimination against protected groups.

B. The Responsible Federal Agencies Have Long Interpreted The RFOA Provision As An Affirmative Defense As To Which The Employer Bears The Burden Of Persuasion

Consistent with ADEA's language and structure, and this Court's construction of the EPA's similarly worded exception to liability in *Corning Glass Works*, the agencies responsible for enforcing the ADEA have long interpreted the RFOA provision as creating an affirmative defense under which employers bear the burden of persuasion.

1. When the ADEA was first passed in 1967, the responsibility to enforce and administer the statute was vested in the Department of Labor (DOL). In 1968, less than a year after the passage of the Act, DOL promulgated a regulation providing that, "in accord with a long chain of decisions of the Supreme Court * * * with respect to other remedial labor legislation, all exceptions such as [RFOA] must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer." 29 C.F.R. 860.103(e) (1969).

2. In 1979, enforcement authority was transferred to the Equal Employment Opportunity Commission. See 29 U.S.C. 621 note. Since that time, both by regulation and in litigation, the EEOC has continued to construe the RFOA exception as an affirmative defense on which the employer bears the burden of proof. See 29 C.F.R. 1625.7(e) ("[T]he employer bears the burden of showing that the [RFOA] exists factually."); *Age Discrimination Employment Act*, 44 Fed. Reg. 68,861 (1979) (proposed interpretations) ("The burden of proof in establishing

that the differentiation was based on factors other than age is upon the employer.").[1]

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[1] By its terms, 29 C.F.R. 1625.7(e) applies "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment." A separate subsection of the RFOA regulation provides: "When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. 1625.7(d). The court of appeals concluded (Pet. App. 13a n.6), based on this regulatory language, that the EEOC construes the RFOA provision as an affirmative defense to be established by the employer only in disparate-treatment cases, and not disparate-impact cases. The court of appeals' conclusion is incorrect.

There is no indication in either the statutory or the regulatory text that Congress or the EEOC intended there to be one burden of proof for the RFOA provision in the disparate-*treatment* context and another in the disparate-*impact* context. To the contrary, from the outset the EEOC's position has been that the employer bears the burden of establishing RFOA in any age-discrimination case. 44 Fed. Reg. at 68,861. The current version of Section 1625.7(d) focuses on the distinct issue of business necessity (and takes a position that does not survive *Smith*—see 544 U.S. at 243; *id.* at 266 (O'Connor, J., concurring in judgment)), and does not address the burden of persuasion (though in context, it is clearly the defendant, not the plaintiff, who would be making the "claim" that the "factor other than age" was the basis for the challenged decision). Although this Court later held that the plaintiff bears the burden of persuading the factfinder on the business necessity, or business justification, in a Title VII disparate-impact case, see *Wards Cove*, 490 U.S. at 659-660, business necessity is not the test under the RFOA defense and the EEOC has continued to interpret the statute and regulations to make the ADEA's RFOA provision an affirmative defense on which the employer bears the burden of persuasion. See, *e.g.*, 29 C.F.R. 1625.7(e). Moreover, that the regulation is written in an awkward fashion or even mistaken in some other particular is not a reason to ignore the EEOC's clear and consistent position that the burden of persuasion quite naturally lies with the defendant. See *Smith*, 544 U.S. at 247 (Scalia, J., concurring).

To the extent there is any ambiguity in the statutory language of the ADEA, DOL's and EEOC's longstanding interpretation of the RFOA provision as an affirmative defense is entitled to deference. See, *e.g.*, *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988) (holding that the EEOC's reasonable interpretation of ambiguous language in Title VII warrants deference); accord *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in judgment); see *id.* at 239-240 (plurality opinion). Deference is particularly appropriate where, as here, the interpretation is set forth in a regulation that was adopted soon after passage of the statute and has remained consistent thereafter. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

The EEOC has, moreover, interpreted its regulations as assigning to the employer the duty to establish the applicability of the RFOA provision in both disparate-treatment and disparate-impact cases. See Gov't Br. as Amici Curiae Supporting Resp. at 23-27, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985) (No. 83-1545) (disparate treatment); EEOC Br. as Amicus Curiae at 5, 11, *Smith* v. *City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996) (No. 95-3802) (disparate impact) ("Consistent with the language of the provision, both the [EEOC] and the Department of Labor have long interpreted § 4(f)(1) as an affirmative defense to disparate impact claims under the ADEA."). In this case, after remand from this Court, the EEOC filed an amicus brief in the court of appeals in which it asserted that, under EEOC regulations, the RFOA provision is "an affirmative defense that the employer must establish." EEOC C.A. Br. on Remand 15. The EEOC's interpretation of its regulations, as explained in its amicus brief in this

and other cases, is consistent with the language of the statute and its other regulatory pronouncements and is therefore entitled to deference. See *FedEx* v. *Holowecki*, No. 06-1322 (Feb. 27, 2008), slip op. 6; *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see also *Smith*, 544 U.S. at 244 n.1 (Scalia, J., concurring in part and concurring in judgment) (deferring to the EEOC's position as reflected in amicus briefs, including the EEOC's pre-remand amicus brief in the Second Circuit *in this case*).

3. Congress's subsequent actions also support the conclusion that employers bear the burden of proof under the RFOA provision. Although Congress has amended the ADEA, including Section 4(f), several times since 1968, it has never overriden DOL's or EEOC's regulations allocating the burden to the employer to establish that "otherwise prohibited" actions fall within the RFOA provision or the ADEA's other exceptions. On the contrary, Congress has drafted legislation on the premise that the agencies have correctly interpreted the language of Section 4(f).

In 1990, Congress amended the ADEA in response to this Court's decision in *Public Employees Retirement System* v. *Betts*, 492 U.S. 158, 180 (1989). See Older Workers Benefits Protection Act (OWBPA), Pub. L. No. 101-433, § 101, 104 Stat. 978. *Betts* concerned Section 4(f)(2) of the ADEA, which then provided: "It shall not be unlawful for an employer * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter." 29 U.S.C. 623(f)(2) (1982); see *Betts*, 492 U.S. at 165. The Court interpreted that provision to be "not so much a defense to a charge of age discrimination as * * * a

description of the type of employer conduct that is prohibited in the employee benefit plan context." *Id.* at 181. The Court accordingly held that, "when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving" that claim. *Ibid.*

In response to *Betts*, Congress amended Section 4(f)(2) to provide: "It shall not be unlawful for an employer * * * *to take any action otherwise prohibited* * * * to observe the terms of a bona fide employee benefit plan" under certain circumstances. 29 U.S.C. 623(f)(2) (emphasis added). The Senate Report described the Act as "overturn[ing] both the reasoning and holding of the Supreme Court in [*Betts*]," by, among other things, "reestablish[ing] that employers bear the burden of proving" "the affirmative defense for employee benefit plans." S. Rep. No. 263, 101st Cong., 2d Sess. 5 (1990). The Senate Report explained that the Act incorporated into the amended Section 4(f)(2) the "otherwise prohibited" language of Section 4(f)(1) specifically for the purpose of clarifying that Section 4(f)(2) establishes an affirmative defense to be proved by the defendant, noting that Section 4(f)(1)'s language "is commonly understood to signify an affirmative defense." *Id.* at 29-30. The Senate Report "note[d] with approval the uniform body of federal court decisions holding that the 'bona fide occupational qualification' exception in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof," and "likewise endorse[d] the position of the EEOC that the 'reasonable factors other than age' exception included in section

4(f)(1) is an affirmative defense for which the employer bears the burden of proof." *Ibid.* (citations omitted).[2]

In enacting the OWBPA, Congress acknowledged the EEOC's and DOL's interpretation of Section 4(f)(1), and it effectively ratified that interpretation by borrowing language from Section 4(f)(1) to make clear that Section 4(f)(2) also sets out an affirmative defense to be established by the employer. That Congress has embraced, rather than overridden, the interpretation of the agencies responsible for ADEA enforcement provides further support for the agencies' longstanding position that the burden of persuasion rests on the employer to establish

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[2] At the time the Senate Report was written, the draft of the OWBPA contained a provision that would have clarified that an employer "acting under paragraphs [(f)(1) or (f)(2)] shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act." See S. 1511, 101st Cong., 2d Sess. (1990). As enacted, however, the amended version of Section 4(f)(2) does not mention Section 4(f)(1), instead providing that "[a]n employer * * * acting under subparagraph (A), or clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter." 29 U.S.C. 623(f)(2). The history of that provision makes plain that Congress omitted the cross-reference to Section 4(f)(1) because it thought the reference superfluous, and not to signal that Section 4(f)(2) should be interpreted to allocate burdens of proof differently from Section 4(f)(1). Explaining the omission, the Senate managers stated:

> [T]he managers declare that they are not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law. * * * * This bill overturns the Supreme Court's allocation of the burden of proof under paragraph 4(f)(2). Because the allocation of the burden of proof under paragraph 4(f)(1) was not at issue in *Betts*, the managers find no need to address it in this bill.

136 Cong. Rec. 25,353 (1990).

the RFOA defense. See *Associated Dry Goods*, 449 U.S. at 600 n.17.

C. Neither *Smith* Nor *Wards Cove* Supports Assigning The Burden Of Persuasion To Plaintiffs To Disprove The Employer's Entitlement To The RFOA Defense

Although the court of appeals acknowledged that "[t]here is some force" to the argument based on the text and structure of the ADEA that the RFOA provision should be interpreted as an affirmative defense to be established by the employer, Pet. App. 13a, it held that this interpretation "does not withstand" this Court's decision in *Smith*, *id.* at 13a-14a. That conclusion is incorrect. The Court in *Smith* did not directly address the burden of proof question presented by this case, and the Court's decision in *Smith* cannot be read to resolve that question.

1. In *Smith*, the Court considered the viability of a disparate-impact claim brought by senior police officers who were challenging a pay plan that granted proportionately higher raises to junior officers. In affirming dismissal of the claim, the Court held that disparate-impact claims are cognizable under the ADEA, but that the scope of ADEA disparate-impact liability "is narrower" than under Title VII, as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. 544 U.S. at 238-242. The Court pointed in particular to two textual differences between Title VII and the ADEA. First, the Court noted that the ADEA contains the RFOA provision, which has no parallel in Title VII. *Id.* at 238-239. Second, the Court noted that, in response to *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), Congress expanded the scope of disparate-impact liability under Title VII in the Civil Rights Act of

1991, but made no similar amendment to the ADEA. Accordingly, the Court stated, "*Wards Cove*'s pre-1991 interpretation of Title VII's *identical language* remains applicable to the ADEA." *Smith*, 544 U.S. at 240 (emphasis added). In the Court's view, these textual differences suggest that Congress intended to "give older workers employment opportunities whenever possible" but also recognized that age, unlike race or sex, "not uncommonly has relevance to an individual's capacity to engage in certain types of employment," and "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.* at 240-241.

Turning to the facts in *Smith*, the Court concluded that plaintiffs could not make out a prima facie case because they failed to identify a specific employment practice that adversely affected older workers. 544 U.S. at 242. But even if they had, the Court concluded that dismissal of that action was appropriate because, in light of the employer's legitimate goals of attracting and retaining officers, the challenged practice was "unquestionably reasonable." *Id.* at 242. The Court acknowledged that "there may have been other reasonable ways for the City to achieve its goals," but explained that, "[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Id.* at 243.

2. *Smith* does not suggest, much less hold, that the plaintiff must bear the burden of persuasion with respect to the reasonableness inquiry under the ADEA's RFOA provision. As the court of appeals itself recognized (Pet. App. 11a-12a), given the obvious fit between the employer's goals and the means selected to achieve

them, the Court in *Smith* had no occasion to resolve the question of which party bears the burden of proof with respect to the RFOA provision, and nothing in the Court's decision purports to resolve the issue.

Nor does *Smith*'s discussion of the textual differences between Title VII and the ADEA suggest a particular allocation of the burden of persuasion with respect to the ADEA's RFOA provision. *Smith*'s reference to *Wards Cove* sheds no light on that question, since, as the Court explicitly noted, Title VII—the statute at issue in *Wards Cove*—contains no analog to the ADEA's RFOA provision. 544 U.S. at 240. Accordingly, although *Wards Cove* may have continued significance in ADEA cases such as this on matters such as the specificity of the practice challenged as having a disparate impact, see *id.* at 241, the effect of the RFOA provision—which was not at issue in *Wards Cove*—is not dictated by that decision.[3]

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[3] The court of appeals attempted to analogize the RFOA provision to Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), which the court identified as "the source of the 'business necessity' test" first announced in *Griggs* in identifying the contours of disparate-impact liability under Title VII. Pet. App. 14a (citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975)); see *Griggs*, 401 U.S. at 432. Section 703(h) provides that it shall not "be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test * * * is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(h). The court of appeals noted that, although this provision "lends itself to interpretation as an affirmative defense, with the burden of persuasion on the employer[,] * * * the Supreme Court has determined that it is not." Pet. App. 15a; see also *id.* at 14a (citing *Wards Cove*, 490 U.S. 642).

The analogy is inapt. As a preliminary matter, it is far from clear that the burden-shifting scheme outlined in *Wards Cove* rests in any way on an interpretation of Section 703(h)—a provision not cited in *Wards*

And although the relationship between age and capacity to participate in certain types of employment may explain why Congress included a RFOA provision in the ADEA and not Title VII, see *Smith*, 544 U.S. at 240-241, that relationship has "no bearing on where the RFOA burden should rest," Pet. App. 31a (Pooler, J., dissenting). If anything, Congress's decision to include the RFOA exception in the part of the statute carving out exemptions to liability provides a clear answer to the burden of proof question in the RFOA/ADEA context relative to Title VII at the time of *Wards Cove*, which lacked an analogous provision. After all, in contrast to the Court's efforts to allocate burdens of proof in the absence of clear textual directives in a case like *Wards Cove*, when the Court construed an analogous *textual*

Cove, and one that is, moreover, expressly limited to the administration of ability tests. It is true that the Court in *Albemarle Paper* stated that *Griggs* "was construing 42 U.S.C. § 2000e-2(h)" when it held that "Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." 422 U.S. at 45 & n.21 (quoting *Griggs*, 401 U.S. at 432). But *Griggs* was also explicit in applying the business-necessity test to employment practices beyond the reach of Section 703(h). 401 U.S. at 431 (applying the business-necessity test to high school diploma requirement); see *id.* at 433 n.8 ("Section 703(h) applies only to tests. It has no applicability to the high school diploma requirement.").

In any event, Section 703(h) differs from the ADEA's RFOA provision in material respects. Perhaps most important, Section 4(f)(1), unlike Section 703(h), clearly creates an exception to liability for practices "otherwise prohibited" by the statute, thus making clear that the provision does more than simply differentiate between lawful and unlawful practices. Thus, even if *Wards Cove* were interpreted as construing Section 703(h) of Title VII—a provision not cited in the Court's decision—it would not control the proper interpretation of the different statutory provision at issue here.

defense in Title VII, it had little difficulty concluding that the defendant bore the burden. See, *e.g.*, *Johnson Controls*, 499 U.S. at 206. And, as discussed, the Court has had little difficulty in giving effect to the similarly worded and equally textually-rooted affirmative defense established by the EPA. See *Corning Glass Works*, 417 U.S. at 196-197. Nothing in *Smith* compels this Court to disregard the clear import of the RFOA provision.

D. The RFOA Defense Replaces, Rather Than Supplements, The Business Necessity Test Applicable In Title VII Cases

Petitioners—like the dissenting judge below, see Pet. App. 23a-24a—take the position that the RFOA provision comes into play only after the parties have litigated the question of business justification pursuant to the *Wards Cove* analysis. Pet. Br. 46-49. In their view, litigation of an ADEA disparate-impact claim therefore requires a four-step process: First, the plaintiff demonstrates that a specific employment practice had a disparate impact on older workers; second, the burden shifts to the defendant to produce evidence of an asserted business justification for the challenged employment practice; third, the burden shifts back to the plaintiff to rebut the employer's proffered justification by proving the existence of other equally effective practices with less discriminatory impact; and finally, the burden shifts to the employer to establish that the adverse impact of its challenged employment practice was based on reasonable factors other than age. *Ibid.* Although the Court could resolve the question presented without more fully addressing the role of the RFOA provision, the government's position is the RFOA plays a much more straightforward role in a much more straightforward statutory scheme.

The ADEA provides no textual basis for asking *both* whether a challenged employment practice is supported by business justification *and* whether it is based on reasonable factors other than age. See Pet. App. 10a n.5 (describing the dissent's proposed approach as "introduc[ing] a redundant (and counterintuitive) step in the analysis"). Nor does *Wards Cove* command that result. The purpose of the business-justification test described in *Wards Cove* is to determine whether the challenged employment practice is being used "merely as a 'pretext' for [age] discrimination." *Wards Cove*, 490 U.S. at 660-661. If disparate-impact plaintiffs have already established that a challenged practice is a pretext for intentional age discrimination, it makes little sense then to ask whether the discriminatory practice is based on reasonable factors *other than age*. Indeed, in *Smith*, this Court observed that the RFOA provision is unnecessary in disparate-treatment cases in which the question is whether the employer has intentionally discriminated *on the basis of age*. See 544 U.S. at 238-239; see also *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1541 (2d Cir. 1996), cert. denied, 522 U.S. 808 (1997) ("The plain language of § 623(f)(1) makes it clear that an employer has a defense if his policy is based on reasonable factors 'other than age,' *not* if the policy is reasonably based on age.").

Rather, like the other affirmative defenses set out in Section 4(f) of the ADEA, the RFOA provision comes into play immediately after the plaintiffs have demonstrated that the employer has engaged in a practice "otherwise prohibited" by the preceding sections of the Act. In a disparate-impact discrimination case, once plaintiffs have demonstrated that a specific employment practice has a significant disparate impact on older wor-

kers—that is, that the employer has "limit[ed], segregat[ed], or classif[ied] his employees in [a] way which * * * adversely affect[s an individual's] status as an employee, because of such individual's age," 29 U.S.C. 623(a)(2)—the burden shifts to the defendant to justify the challenged employment practice by persuading the factfinder that the adverse impact of the practice resulted from the use of reasonable criteria other than age.

That does not mean that *Wards Cove* has no application in a disparate-impact case under the ADEA. As *Smith* illustrates, *Wards Cove* applies to ADEA cases such as this on matters such as the specificity of the practice challenged as having a disparate impact. See *Smith*, 544 U.S. at 240-241.

As this Court's decision in *Smith* illustrates, the burden of establishing a RFOA is neither impractical nor insurmountable. See 544 U.S. at 241-242. Indeed, as petitioners explain (at 35-36), in the wake of this Court's decision in *Smith*, most disparate-impact claims brought under the ADEA have been dismissed at the pleadings stage. But the burden of establishing a RFOA is nevertheless one that Congress placed on employers that assert that affirmative defense.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD B. MEACHAM, ET AL.,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, ET AL.,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Second Circuit

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INTEREST OF *AMICI CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Approximately half of AARP's more than 40 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, and other employment laws. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members in all academic disciplines. The AAUP is committed to the protection of members' rights to academic freedom, tenure, and freedom from discrimination. *See, e.g.*, *On Discrimination and 1940 Statement of Principles on Academic Freedom* and *Tenure*, AAUP Policy Documents & Reports (10th Ed., 2006). The AAUP

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[1] This Brief of *Amici Curiae* AARP, the American Assosication of University Professors, and the National Employment Lawyers Association (NELA) in support of Petitioners is filed with the consent of both parties. In compliance with Rule 37.6 of this Court, *amici* state that no counsel for any party authored this brief in whole or in part, and further, that no party or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

and its members are concerned that university administrators could utilize the job-evaluation matrix that Knolls Atomic Power Laboratory deployed to lay off tenured professors in cases of financial exigency. In such circumstances, the burden of proof must be on administrators, who control such a process, to prove that their methods were reasonable despite their disparate impact on ADEA-protected faculty members. Failure to correctly assign the burden of proof would undermine professors' ability to ensure freedom from age discrimination in the academic workplace.

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a current membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the work place. NELA advocates for employee rights and work place fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The *amici* have filed numerous *amicus curiae* briefs before this Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws ensuring full enforcement of the laws and full protection of the rights of workers. In addition, all filed *amici curiae* briefs with this Court in *Smith v.*

City of Jackson, Mississippi, 544 U.S. 228 (2005), and both AARP and NELA filed briefs with the U.S. Court of Appeals for the Second Circuit in this case concerning the applicability and appropriate standard for disparate impact claims under the ADEA.

SUMMARY OF ARGUMENT

Well before the enactment of the ADEA in 1967, the concept of "burden of proof" acquired a settled meaning in American law: "The emerging consensus on a definition of burden of proof was reflected in the evidence treatises of the 1930's and 1940's. 'The burden of proof is the obligation which rests on one of the parties to an action to persuade the trier of the facts, generally the jury, of the truth of a proposition which he has affirmatively asserted by the pleadings.'" *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (citing W. Richardson, EVIDENCE 143 (6th ed. 1944)).

In this case, the Court is called upon to decide which party shoulders that obligation with respect to the "reasonable factors other than age" (RFOA) provision under section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). To resolve this issue, the Court may call on several conventions of statutory construction and interpretation. All lead to the same conclusion: that Congress intended the employer to bear the burden of proving the existence of such "reasonable factors."

The specific language of the RFOA provision "to take any action otherwise prohibited" together with

"factors other than age" presumes that a violation of ADEA section 4(a) has been established due to the adverse effects of a neutral employment practice on older individuals because of age. The language, as well as the placement of the RFOA with the other affirmative defenses in ADEA section 4(f)(1), 29 U.S.C. § 623(f)(1), strongly supports the conclusion that the RFOA is an affirmative defense on which the employer bears the burden of proof.

ARGUMENT

I. BOTH THE LANGUAGE AND CONTEXT OF THE REASONABLE FACTORS OTHER THAN AGE PROVISION ESTABLISH IT AS AN AFFIRMATIVE DEFENSE.

This Court has declared that "[w]hen we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Accordingly, resolution of the question of which party bears the burden of proof under section 4(f)(1) of the ADEA must begin with the statutory language, which states:

> It shall not be unlawful for an employer, employment agency, or labor organization —
> (1) *to take any action otherwise prohibited* under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the

> particular business, or *where the differentiation is based on reasonable factors other than age* or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

29 U.S.C. § 623(f)(1) (2006) (emphasis added).

1. The Placement of the RFOA Provision Contiguous to the ADEA's Other Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense for which the Employer Bears the Burden of Proof.

The placement of a provision within the context of the statute provides particular insight into its meaning. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").[2] The RFOA

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[2] *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("[t]he meaning - or ambiguity- of certain words or phrases may only become evident when placed in context . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overal' statutory scheme.'") (*quoting Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

provision of the ADEA is sandwiched between the bona fide occupational qualification provision (BFOQ) and the foreign workplace provision. The line of authority treating the section 4(f) exemptions as affirmative defenses is uniform and unbroken. *See Smith v. City of Jackson, Mississippi,* 544 U.S. 228, 233 n.3 (2005) ("[l]ike Title VII with respect to all protected classes except race, the ADEA provides an affirmative defense to liability where age is a 'bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . .' § 4(f)(1)"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596-97 (2004) ("[f]or the very reason that reference to context shows that 'age' means 'old age' when teamed with 'discrimination,' the provision of an affirmative defense when age is a bona fide occupational qualification readily shows that 'age' as a qualification means comparative youth") (citing 29 U.S.C. § 623 (f)); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86-87 (2000) (referring to BFOQ "defense"); *Pub. Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 176 (1989) (referring to the provisions in section 4(f)(1) as "exemptions and affirmative defenses"); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n. 24 (1985) (endorsing BFOQ analysis used by the EEOC that places burden of proving exception on the employer); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (stating that the ADEA contains "five affirmative defenses" in 29 U.S.C. § 623(f)).[3] The

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[3] The foreign workplace provision, which was added to the ADEA in 1984 by § 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767, 1792 has also been recognized as an affirmative defense. *See*

juxtaposition of the RFOA provision with these other affirmative defenses certainly supports a holding that it too is an affirmative defense.

The BFOQ and RFOA provisions have been juxtaposed to each other from the earliest drafts of the ADEA proposed by the Johnson Administration.[4] Their contiguous relationship is, therefore, no accident. To the contrary, their purposeful placement together implies that the defenses are to be interpreted similarly. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("we construe language in its context and in light of the terms surrounding it.").

The first part of ADEA section 4(f)(1) provides an affirmative defense to facially discriminatory classifications. *See Thurston*, 469 U.S. at 122. The explicit use of age in the terms of a policy or practice is "otherwise prohibited" by section 4(a) unless justified by a BFOQ. The BFOQ defense in section 4(f)(1) permits an employer to justify the use of age as a

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Mahoney v. Radio Free Europe/Radio Liberty, Inc., 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd on other grounds*, 47 F.3d 447 (D.C. Cir. 1995) (construing foreign employee provision as an affirmative defense). *See also* Clarence Thomas, Chairman, EEOC, Policy Guidance: Analysis of "Foreign Laws" Defense of ADEA (Dec. 5, 1989) (noting that the employer has the burden of proving the elements of the foreign workplace exception).

[4] *See* H.R. 90-13054 & S. 90-830 (1967), *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, at 89 & 121.

criterion by demonstrating that its consideration is bona fide and reasonably necessary to the operation of the business. *Criswell*, 472 U.S. at 411-12.

If an action violating section 4(a) has been established, an employer can also utilize the RFOA defense provided in the second part of ADEA section 4(f)(1). The "factors other than age" language in the RFOA provision connotes that the second part of ADEA section 4(f)(1) responds to classifications that are facially neutral, for facially discriminatory policies are addressed by the BFOQ provision. The Court in *EEOC v. Wyoming* established that a BFOQ affirmative defense responds to a facially discriminatory violation, while an employer may assert the RFOA provision when it used a factor that, while facially neutral, adversely impacted older workers. 460 U.S. 226, 232-33 (1983) ("[I]n order to insure that employers were permitted to use neutral criteria not directly dependent on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the Act provided that certain otherwise prohibited employment practices would not be unlawful 'where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.' § 4(f)(1), 29 U.S.C. 623(f)(1)."). Therefore, the placement and context of the RFOA provision support reading the provision as a defense to facially neutral actions that violate § 4(a).

2. By Including The Prefatory Language "Any Action Otherwise Prohibited" in §4(f)(1), Congress Manifested Its Intent to Create an Affirmative Defense to a Violation of ADEA § 4(a).

The RFOA provision begins with a specific proviso: "to take any action otherwise prohibited." 29 U.S.C. § 623(f)(1). As explained in the preceding section, this prefatory phrase presupposes that a violation of an ADEA prohibition has been established. By this language, Congress placed the burden of proof on the employer. As demonstrated below, Congress added the identical language to ADEA section 4(f)(2), 29 U.S.C. § 623(f)(2), in the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No. 101-433, § 103(1) (1990), to remove any doubt that section 4(f)2) of the ADEA is an affirmative defense.

Prior to 1990, ADEA section 4(f)(2) did not include the proviso language "to take any action otherwise prohibited" but instead had read:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this Act . . . .

29 U.S.C. § 623(f)(2) (1989).

The OWBPA's amendment to section 4(f)(2)[5] reflects Congress' understanding of the meaning and effect of the key phrase "otherwise prohibited" in section 4(f)(1). Congress copied the proviso language from section 4(f)(1) to make unmistakably clear that

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[5] The OWBPA amended section 4 of the ADEA by "inserting the following new paragraph:

> '(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –
>
> > '(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or
> >
> > '(B) to observe the terms of a bona fide employee benefit plan –
> >
> > > '(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1635.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or
> > >
> > > '(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act."

Pub. L. No. 101-433, § 103 (1990).

the similarly structured section 4(f)(2) was to be interpreted in parity with section 4(f)(1):

> The Committee intends that the amendments made by the bill to section 4(f)(2) . . . should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defenses, section 4(f)(1). Accordingly, the language of section 4(f) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . *to take any action otherwise prohibited*" by the ADEA (emphasis added)) should be applied to the revised section 4(f)(2) . . . The Committee [ ] endorses the position of the EEOC that the "reasonable factors other than age" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (*See* 29 C.F.R. § 1625.7), and expresses approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception.

H.R. Rep. No. 101-664, at 253-54 (1990). Although this passage refers to an earlier draft of the OWBPA, which had included language, subsequently dropped, stating that employers relying on either a BFOQ or RFOA "shall have the burden of proving such actions are lawful," the message of the passage is still valid and relevant: Congress intended for the identical

language in both sections to have the same effect – create an affirmative defense.

Finally, faced with comparable language in the Equal Pay Act, 29 U.S.C. § 206(d), this Court recognized that the parallel "other factors other than sex" provision is an affirmative defense, on which the employer bears the burden of proof. *Washington County v. Gunther*, 452 U.S. 161, 170-71 (1981); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974). If anything, the RFOA exception is narrower than its counterpart under the EPA, because it requires that the factor relied upon be "reasonable," and should be construed more strictly against the employer. *Smith*, 544 U.S. at 239, n. 11, (describing as "instructive" the fact that, unlike EPA's defense which may extend even to unreasonable factors, the defense under the ADEA must meet a reasonableness standard).

II. LONGSTANDING REGULATORY INTERPRETATIONS OF THE ADEA RECOGNIZE THE RFOA PROVISION AS AN AFFIRMATIVE DEFENSE.

Just days after the ADEA became effective, the Department of Labor (DOL) issued interpretative regulations of the new statute. 33 Fed. Reg. 9172 (1968), 29 C.F.R. §§ 860.103-04 (1970). Those contemporaneous DOL interpretations provide insight into the meaning and application of the RFOA provision, particularly since they were written by DOL Secretary Wirtz, whose administration also drafted the ADEA to implement the recommendations

contained in his 1965 Report to Congress.[6] *See* 113 Cong. Rec. 1377 (1967).

The DOL interpreted the RFOA provision as an affirmative defense to non-age-related factors and stated that both the BFOQ and RFOA defenses in section 4(f)(1) "must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer. . . ." 29 C.F.R. § 860.102(b), 860.103(e), 33 Fed. Reg. 9173 (1968). As examples of "differentiations based on reasonable factors other than age," DOL identified employee tests, 29 C.F.R. § 860.103(f), quantity or quality of production, and educational requirements. 29 C.F.R. § 860.103(f)(2). These practices are the very types of facially neutral practices that have since been

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[6] U.S. Dept. of Labor, THE OLDER WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) ("WIRTZ REPORT"). Following the Wirtz Report, Congress directed the Secretary of Labor to submit legislative recommendations to include:

> Provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.

Pub. L. No. 89-602, § 606, 78 Stat. 265 (1966). In response to Congress' request, the "President's recommendation" was introduced as S. 830 by Senator Yarborough on February 3, 1967. 113 Cong. Rec. 2467-2476 (1967).

challenged under the disparate impact method of proof in Title VII cases. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (tests); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (physical fitness standards).

When the EEOC subsequently assumed responsibility for the enforcement of the ADEA, it continued to view the RFOA provision as an affirmative defense: "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. § 1625.7(e) (2004).

As the Court found in *Chevron USA Inc. v. Echazabal*, 536 U.S. 73 (2002), a reasonable EEOC regulation promulgated within the agency's rule-making authority ought to be enforced. Reviewing an Americans with Disabilities Act (ADA) regulation defining the "direct threat" defense, the Court unanimously held that "the EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in 42 U.S.C. § 12113(a)." *Id.* at 85.

In the present case, the Second Circuit declined to apply the EEOC's interpretation of RFOA because (1) the regulation mentions only an "individual claim of discriminatory treatment," not disparate impact, and (2) it considered that the holding in "*City of Jackson* directly contradicts 29 C.F.R. § 1625.7(d),

which interprets the RFOA provision as mandating a 'business necessity' test when a plaintiff has established a *prima facie* case of disparate impact, . . ." *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 142 n.6 (2d Cir. 2006).

The Second Circuit's first justification runs afoul of the principle that "[a]n agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2537-38 (2007) (*quoting Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Just this term, the Court reiterated the importance of deference to the EEOC's administrative authority in *Federal Express Corp. v. Holowecki*, No. 06-1322, 2008 WL 508018 (U.S. 2008): "Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force." The Court considered pertinent the fact that the "EEOC has adopted this position in the Government's *amicus* brief and in various internal directives it has issued to its field offices over the years." *Id.* at *6. Similarly, in the present case, the United States has filed an *amicus* brief in support of its regulation placing the burden of RFOA on the employer (as the EEOC did in the Second Circuit below). *See Auer*, 519 U.S. at 462 (where agency was not merely defending its own actions in litigation, there was "no reason to suspect that the interpretation [in an amicus brief] does not reflect the agency's fair and considered judgment on the matter in question.").

As to the Second Circuit's second justification, the court misapprehended the Court's *Smith* decision, which did not consider the burden of proof, much less assign it to the plaintiff. There, the employees failed to establish a *prima facie* case of disparate impact; that is, they never "identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers." *Smith*, 544 U.S. at 241. The plurality concluded that there was no disputed issue of fact about the reasonableness of the employer's stair-step wage policy "to raise the salaries of junior officers to make them competitive with comparable positions in the market." *Id.* at 242. *Smith* left the question of burden of proof on RFOA open not because it was a close or difficult question, but because the facts before the Court in *Smith* did not require the Court to determine where the burden of proof lay.

III. A PARTY SEEKING TO ESCAPE LIABILITY FOR A STATUTORY VIOLATION BEARS THE BURDEN OF PROOF.

When a party seeks to defend a violation by asserting an exception to liability, that party typically bears the burden of proving that its conduct falls within the exception. *See, e.g.*, *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967) (as a general rule, party claiming the benefits of an exception bears the burden of proof); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (FLSA exemptions are to be "narrowly construed against . . . employers" and are to be withheld except as to persons "plainly and unmistakably within their terms and spirit"); *FTC v.*

Morton Salt Co., 334 U.S. 37, 44-45 (1948) ("the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits"). There is no special basis for concluding here that the employer should be free of this burden under section 4(f) of the ADEA. In fact, this general rule is applied with special force in the context of a remedial statute like the ADEA. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (Title VII BFOQ exception); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (Fair Labor Standards Act exception). As the U.S. Court of Appeals for the Seventh Circuit stated with regard to section 4(f)(2) of the ADEA, the ADEA's affirmative defense for cost-based age-related differences in employee benefits, "[W]here . . . the employer uses age – not cost, or years of service, or salary – as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2)." *Karlen v. City Coll. of Chicago*, 837 F.2d 314, 319 (7th Cir. 1988). The same reasoning should hold true for the ADEA's "reasonable factors other than age" affirmative defense – if an employer wants to shelter in its safe harbor, the employer must be expected to prove that its actions were based on a factor "other than age" that was "reasonable."

This Court has also embraced "[t]he ordinary rule, based on considerations of fairness," that it does "not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Schaffer ex rel. Schaffer*, 546 U.S. at 60

(quoting *United States v. N.Y., New Haven & Hartford R. R. Co.*, 355 U.S. 253, 256 n.5 (1957) and citing *Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993)); *see also Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 494 n.17 (2004) ("[A]llocations of burdens of production and persuasion may depend on which party-plaintiff or defendant, petitioner or respondent – has made the 'affirmative allegation' or 'presumably has peculiar means of knowledge.'") (citation omitted). The employer has superior awareness of the reasons for its policies, especially where (as here) they are alleged to be subjective. *See Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (regarding defense of qualified immunity, "[t]he existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know"; for example, "the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware.").

The Court has long recognized the burden on the employee to prove discrimination in employment discrimination cases. *See, e.g., Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (employee bears the "ultimate burden of persuading the court that she has been the victim of intentional discrimination"). But, correspondingly, the Court expects employers to step forward and justify (under an exemption or defense) policies that demonstrably disadvantage a protected class. *See, e.g., Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (fetal-protection program that barred women from certain assembly jobs; "[w]e have no difficulty

concluding that Johnson Controls cannot establish a BFOQ"); *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 717 n.31 (1978) (policy requiring women to pay more for pension benefits; "even if the contribution differential were based on a sound and well-recognized business practice, it would nevertheless be discriminatory, and the defendant would be forced to assert an affirmative defense to escape liability.").

For the same reasons, in Title VII mixed motive cases an employer is required to prove that it would have taken the same action against an employee, notwithstanding a discriminatory factor. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95 (2003) (noting under 42 U.S.C. § 2000e-5(g)(2)(B) that "in order to avail itself of the [mixed-motive] affirmative defense, the employer must 'demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor'"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion) (shifting burden of proof in mixed-motive cases). This analysis also applies when construing the ADEA. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (noting that the Court has "incorporated Title VII standards when interpreting statutes prohibiting other forms of discrimination.").

IV. REQUIRING AGE DISCRIMINATION VICTIMS TO PROVE THAT AN EMPLOYER'S RELIANCE ON A FACTOR THAT ADVERSELY IMPACTED OLDER WORKERS WAS "UNREASONABLE" WOULD SIGNIFICANTLY WEAKEN THE ADEA'S PROTECTIONS.

A requirement that plaintiffs alleging violations of the ADEA, having already "isolat[ed] and identif[ied] the *specific* employment practice[ ]" that had a disproportionately adverse impact on older workers, *Smith*, 544 U.S. at 241, carry the additional burden of proving the absence of "reasonable factors other than age," would cripple age discrimination victims' ability to prevail on a disparate impact claim. Under such a standard, employers could easily articulate "other factors" without being obligated to prove them. As a result, bringing a disparate impact claim might become an exercise in futility.

Since the employer is in the best position to evaluate the factors related to performance of the job, and more likely to have access to data justifying the policy or practice at issue, the burden of proving the reasonableness of the factors it chose should logically be placed on the employer. *See United States v. Paramount Pictures*, 334 U.S. 131, 148 (1948) ("To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive effects.").

To make refuting an RFOA an element of the employee's case would require plaintiffs, even before

civil discovery, to plead the RFOA in their complaints and to present plausible explanations as to why the factors are unreasonable. *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1967 (2007) ("plausible entitlement to relief" must be pled at outset of case and should not await discovery). It would require employees to be gifted with second sight: to know in advance what reasons the employer might advance, and to attack the rationale, all without access to the employer's records or witnesses.

A review of some of the RFOAs asserted in past cases reveals how impracticable it would be for age discrimination victims to plead and disprove that an employer's reliance on the factor was reasonable. Sometimes, the reasons are purely internal business strategies to which the employer alone has privileged access. *See, e.g., Pippin v. Burlington Resources Oil and Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006) ("[c]orporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations"); *Maresco v. Evans Chemetics*, 964 F.2d 106, 113 (2d Cir. 1992) (stating decision to consolidate offices and terminate some workers may be based on "considerations of cost and administrative convenience" may be RFOA). Or proof of the "reasonable" factors may be technical and beyond the employees' ken at the pleading stage. *See, e.g., Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1471 (8th Cir. 1996) (city defended policy of requiring firefighters to pass annual physical fitness tests for approval to wear a self-contained breathing apparatus (a job requirement) as an RFOA; policy was tied to "the

extensive regulations governing the manner in which the city operates its fire department").

This present case also illustrates how unjust it is to require age discrimination victims to plead and disprove an employer's assertion that the substantial adverse impact on older workers was in fact based on "reasonable factors other than age." In a reduction-in-force case like this one, the employer is in the unique position to know what the organization seeks to achieve going forward and what its specific objectives for the work force reduction were. How retaining employees with the characteristics of "criticality" and "flexibility" would help the organization meet these objectives; and why those characteristics were necessary for the future success of the organization is knowledge that the Respondent should have easily been able to produce. That same knowledge is not available to terminated employees who may not have even been aware that a reduction-in-force was being contemplated and most certainly were not privy to information concerning the goals and objectives of the reduction-in-force. In this case, the factors relied upon resulted in "startlingly skewed results," *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 75 (2d Cir. 2004) and it is appropriate to require the Respondent and other defendants to prove that reliance on factors that cause such stark disparities was reasonable.

Where age discrimination has been shown, the RFOA defense must constitute more than a mere denial of such discrimination. As this Court recognized in *Smith*, Congress' decision to include the RFOA provision "is consistent with the fact that age,"

in some circumstances, "has relevance to an individual's capacity to engage in certain types of employment." 544 U.S. at 240. Significantly, however, the *Smith* Court also pointed out that Congress "recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact." *Id.* Indeed, the ADEA was enacted after a finding by Congress that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice . . . ." 29 U.S.C. § 621 (a)(2) (2006). The legislative history of the Act makes clear that the broad remedial purpose of the ADEA is to eliminate age-based stereotypes in favor of individualized employment decisions based on a person's ability and capability.[7]

Given the tendency to make inaccurate age-based assumptions about an individual's ability to perform a job, and bearing in mind the ADEA's

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[7] *See Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. On Labor and Public Welfare*, 90th Cong. 28 (1967) (statement of Sen. Jacob Javits) ("We must break down the wholly irrational barriers to employment based on age alone which have been permitted to hinder the older worker in a search for employment opportunity. This present age has been called an age where the cult of youth seems to prevail over everything else . . . [I]t will be our job to introduce a note of realism in that situation which will emphasize the ability and capability of the worker to do the job, rather than his age level, as the desirable criterion for American employment practices.").

purpose of eradicating such assumptions, any exception to the Act must be interpreted to advance rather than frustrate its purpose. So, while the RFOA defense does contemplate that some policies that adversely impact older workers may be justified because they are based on age-neutral, job-related factors, "overuse of [an] exception involves the risk of reintroducing on a broad scale the very age stereotyping the ADEA was designed to prevent." *Orzel v. Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983).

If plaintiffs must prove the absence of a "reasonable factor other than age", the value of the disparate impact theory in ferreting out "the problem of subconscious stereotypes and prejudices," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), will be wholly negated. In *EEOC v. Wyoming*, the Court recognized, as the Wirtz Report explained, that irrational judgments based on age stereotypes were "often defended on grounds different from [their] actual causes," 460 U.S. at 231; *see* WIRTZ REPORT at 8. The Report elaborated that "a great many age limitation policies are based in fact on considerations quite different from those offered as (and undoubtedly believed to be in many cases) their explanation." *Id.* The Report identified the physical demands of the particular job in question as one of the age-neutral explanations offered by employers for excluding older workers, but noted as relevant, that "in determining the true basis for these age limitations which are explained in terms of physical demands of the work . . . in 70 percent of the cases of claimed basing of age limits on physical capabilities . . . no studied basis for

this conclusion was reported." *Id.* If employers are not required to prove that the age-neutral factor relied upon was "reasonable," employers will be free to act based on age-correlated factors that can be used to disguise age-stereotyping and may discriminate against older workers with ease.

CONCLUSION

For the foregoing reasons, *amici* AARP, AAUP and NELA respectfully submit that this Court should hold that the employer bears the burden of persuasion on the ADEA's "reasonable factor other than age" defense. Accordingly, the judgment of the United States Court of Appeals for the Second Circuit should be vacated and the case remanded for further proceedings.

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(13)

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No. 06-1505

In The
Supreme Court of the United States

CLIFFORD B. MEACHAM, ET AL.,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, INC., ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, in proving discrimination "because of age" in a disparate impact case under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, the plaintiff bears the burden of proving that the employer's conduct was not based on a reasonable factor other than age.

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INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest business federation, with an underlying membership that includes more than three million businesses and organizations of every size, operating within every industry sector and geographical region of the United States. A principal function of the Chamber is to represent its members' interests in cases raising issues of widespread concern and application to the business community. In that capacity, the Chamber has participated in hundreds of cases before this Court, including cases involving the Age Discrimination in Employment Act, such as *Smith v. City of Jackson*, 544 U.S. 228 (2005), and filed a brief as amicus curiae with the court of appeals prior to its first decision in this case.

The Chamber fully endorses the Age Discrimination in Employment Act and that law's recognition of the important contributions that older, more experienced workers make to the vitality and productivity of the American workforce. At the same time, the Chamber believes it is critical to preserve the careful balance that the Act strikes between prohibiting irrational barriers to the employment of older workers and preserving the flexibility and discretion to make sound business judgments that employers need to

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[1] Pursuant to this Court's Rule 37.3, this brief is filed with the written consent of the parties to the case, both of which have filed letters with this Court granting blanket consent for amicus briefs. Pursuant to this Court's Rule 37.6, no counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution intended to fund the preparation or submission of this brief.

compete in the modern economy. Properly allocating the burden of proof in disparate impact cases is critical to maintaining that balance.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, generally protects employees who are at least 40 years old, 29 U.S.C. 631(a), against discrimination in employment on the basis of their age. The Act's coverage is sweeping: more than half of all American employees – 53% – are over the age of 40, and that percentage may grow in the coming years.[3]

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that disparate impact claims are available under Section 623(a)(2) of the ADEA. See *id.* at 233-240 & n.6. In so holding, the Court stressed that such claims are much more restricted under the ADEA than under Title VII's prohibition on race, sex, national origin, and religious discrimination in employment, see 42 U.S.C. 2000e *et seq.* See *Smith*, 544 U.S. at 233, 240 (plurality opinion). That is because Congress recognized that employers commonly make reasonable and legitimate business decisions based on factors and considerations that correlate with age and, in fact, that age itself is sometimes a relevant consideration in employment decisionmaking. The ADEA thus expressly preserves

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[2] This brief uses the terms "burden of proof" and "burden of persuasion" interchangeably.

[3] See http://www.bls.gov/web/cps/cpsaat3.pdf; Kenneth R. Davis, *Age Discrimination and Disparate Impact*, 70 BROOK. L. REV. 361, 400 (2004).

employers' discretion to differentiate between employees if the decision "is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). For three reasons, the plaintiff bears the burden of proof that a disparate impact on older workers is, in fact, because of age, and thus is not attributable to a reasonable factor other than age.

First, the starting principle is that plaintiffs bear the burden of proving all of the elements necessary to establish liability for a claim. In this context, that means that the plaintiff bears the burden of proving that discrimination on the basis of age occurred. Because the plaintiff bears the burden of proving that discrimination occurred "because of age," it would be illogical for the employer to bear the burden of proving that the alleged discrimination was because of some reasonable factor other than age, and thus was not "because of age." That would require the employer to disprove what should be an element of the plaintiff's claim. This Court's decisions in *Smith* and *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989), confirm that plaintiffs in disparate impact cases under the ADEA bear the burden of proving not just that a specific employment practice has caused a significant statistical disparity, but also that the employment practice is not reasonable. That allocation of the burden of proof, moreover, conforms to the rule in ADEA disparate-treatment cases that the plaintiff has the burden of disproving an employer's assertion that the adverse employment practice was based on a "legitimate non-discriminatory reason." See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

Second, leaving the burden of proof on the plaintiff is fair and workable, and it is necessary to preserve for employers the discretion and flexibility that they need to compete in the modern economy. Simply demonstrating a statistical disparity on workers over 40 says very little about whether the employment practice is, in fact, statutorily proscribed or even inspires sufficient concern or suspicion to warrant visiting the burden of proof on the defendant. Indeed, petitioners' argument admits as much by asserting that the burden of proof for the reasonable factor other than age would not shift until the plaintiffs first prove not only statistical disparity, but also the lack of business justification. The problem with that proposed paradigm, however, is not only the ping-ponging burdens of proof that juries would be required to track, but also this Court's recognition in *Smith* that the "reasonable factor other than age" inquiry under the ADEA displaces the more exacting business justification test. There thus is no apparent reason for parties or the court to devote time and resources to litigating the often-complex business justification issue when a reasonable non-age basis for the practice would immediately negate any basis for liability propounded by the plaintiff. And if, as petitioners propose, plaintiffs can and should bear the burden of disproving business justification, they equally can and should bear the burden of proving that the defendant acted unreasonably – a litigation task commonly assigned to plaintiffs in tort law and in a broad variety of other areas of the law.

Third, there is no basis for deference to the EEOC's litigation position asserting that the burden

of proof should be shifted to the employer. To begin with, the regulations that the EEOC has promulgated suggest the opposite. The first of those regulations provides that the "reasonable factor other than age" should be proven in disparate impact cases in the same manner as the business necessity defense. But, under *Wards Cove* and *Smith*, that approach would leave the burden squarely on the plaintiff, not the employer. Congress has made no such amendment and, even though *Smith* and *Wards Cove* have been on the books for a number of years, the EEOC has never amended its regulation to realign the burden of proof in the wake of those decisions.

A second regulatory provision expressly places the burden of proving the "reasonable factor other than age" on the defendant. But that regulation is specifically limited to disparate treatment cases. The EEOC, in fact, specifically deleted draft language in that regulation that spoke more broadly. The EEOC should not be able to reinstate a rejected regulatory text through brief writing. Finally, deference to litigation positions is particularly inappropriate when the statutory question at issue involves not how statutory terms should be interpreted or how a specialized administrative adjudicatory process should operate, but how legal claims should be proven in a courtroom, and the agency itself is a courtroom litigant with a vested interest in relieving its own burden of proof.

ARGUMENT

IN A DISPARATE IMPACT CASE, THE PLAINTIFF BEARS THE BURDEN OF PROVING THAT THE ALLEGED DISCRIMINATION IS BECAUSE OF AGE, AND NOT BECAUSE OF A REASONABLE FACTOR OTHER THAN AGE

A. Statutory Text And Precedent Require The Plaintiff To Prove The Cause Of The Alleged Discrimination

1. The Plaintiff In A Disparate Impact Case Must Prove Adverse Action "Because Of Age"

While nothing in the ADEA's text expresaly allocates the burden of proof for the "reasonable factor other than age" (RFOA) inquiry, the structure of the statute, combined with established rules of burden allocation, demonstrate that the burden rests on the plaintiff. As relevant to disparate impact cases, the ADEA prohibits an employer from "limit[ing], segregat[ing], or classify[ing] his employees" in a manner that adversely affects the individual's employment opportunities or status "because of such individual's age." 29 U.S.C. 623(a)(2). Accordingly, liability under the ADEA hinges on whether the alleged adverse employment action befell the employee "because of [the employee's] age."[4] Under traditional principles of burden allocation, the plaintiff – the party seeking affirmative action and relief through the intervention of the court – "bear[s] the burden of persuasion re-

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[4] Although not applicable in a disparate impact case, see *Smith*, 544 U.S. at 236 & n.6, Section 623(a)(1) likewise prohibits only actions taken "because of such individual's age."

garding the essential aspects of [its] claim." *Schaffer v. Weast*, 546 U.S. 49, 57 (2005). Plaintiffs in an ADEA case thus bear at all times the burden of proving that the alleged discrimination was "because of [their] age."

The Court held in *Smith* that a discriminatory impact claim is one proper means of proving discrimination "because of * * * age" under Section 623(a)(2). In recognizing the availability of disparate impact claims under the ADEA, however, *Smith* did not – could not – alter the statutory text or eliminate the plaintiff's ultimate obligation to establish that the alleged discrimination was "because of * * * age." See *Smith*, 544 U.S. at 235 (plurality opinion) (recognizing disparate impact claims rests on "the better reading of the statutory text"); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (plurality opinion of O'Connor, J.) (the different "factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used").

To the contrary, this Court has long recognized that disparate impact claims are a means of proving that an adverse employment action is because of or attributable to an employee's protected status (whether race, sex, or age), and thus that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Fort Worth*, 487 U.S. at 987 (plurality opinion of O'Connor, J.). Disparate impact claims do not turn upon the employer's intent or purpose. But they still

require proof that, whatever the subjective motivation, the employer's action "in fact fall[s] more harshly on one group" of employees because of that status and not because of another reason, *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), and thus the employer's action is "discriminatory in operation," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).[5]

2. The RFOA Provision Directly Counters The Plaintiff's Case

Read against the backdrop of the plaintiff's statutory burden to establish that the alleged discrimination was "because of * * * age," Section 623(f)'s provision that employer conduct is lawful if based on "reasonable factors other than age" functions not as an affirmative defense, but as a straightforward denial of the plaintiff's statistical disparate-impact case. When a plaintiff claims that he was fired or laid off because of his age, an employer, invoking the RFOA provision "replies, in effect, not so, plaintiff was fired for * * * some other non-discriminatory reason." *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588,

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[5] See also *Smith*, 544 U.S. at 234 (plurality opinion) (disparate impact claims eliminate practices that "operate as built-in headwinds for minority groups"); *Griggs*, 401 U.S. at 430 (employment practices that are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); J.A. 73 (jury finding that disparate impact was "because of their age"); 7/25/00 Tr. 4732 (Jury Instructions) (under disparate impact theory, "[i]t is sufficient if the plaintiffs establish by a preponderance of the evidence that they experienced an adverse impact different from similarly situated co-workers because of the ages of the plaintiffs, whether or not the defendant you are considering intended that such a result occur").

591 (5th Cir. 1978). The RFOA provision operates in the same manner in disparate impact cases. The essence of petitioners' disparate impact claim is that, while the reduction-in-force process was facially neutral, the "startlingly skewed results" of the plan, Pet. Br. 7, combined with the substantial opportunity the plan's terms allegedly left for individual supervisors to "give effect to overt or subconscious bias," *id.* at 8, permitted the jury to conclude that the firings were because of the employees' age. Likewise, even in disparate impact cases that involve non-discretionary criteria, the plaintiff's prima facie statistical case is still designed to demonstrate that, whatever the employer's subjective motivation, the employment action fell significantly more harshly on older workers because of their age. *Teamsters*, 431 U.S. at 335 n.15. Under both scenarios, employers invoking the "reasonable factor other than age" provision reply "not so," *Marshall*, 576 F.2d at 591, asserting a reasonable non-age based explanation for the results.

Thus, unlike an affirmative defense, the employer's identification of a reasonable, non-age basis for the employment decision does not admit the plaintiff's prima facie case, and then assert a distinct legal basis in defense. Instead, it "contradict[s] or tend[s] to disprove an[] element of the statutory" claim. *Dixon v. United States*, 126 S. Ct. 2437, 2444 (2006); see *Marshall*, 576 F.2d at 591 (the bona fide occupational qualification provision is an affirmative defense – "one in the nature of confession and avoidance," but the RFOA provision is simply a "denial[] of the plaintiff's prima facie case"); *Black's Law Dictionary* 55 (5th ed. 1979) (defining "affirmative de-

fense" as a "new matter which, *assuming the complaint to be true*, constitutes a defense to it") (emphasis added).

To be sure, the ADEA restricts employers to using "reasonable" factors other than age, but that does not change the fundamental function that the provision serves in the proof of an ADEA case. Assertion of the RFOA remains a straightforward denial of the plaintiff's claim that the adverse employment action occurred or befell the employees "because of age," arguing instead that the action is "attributable to a nonage factor," *Smith*, 544 U.S. at 239 (plurality opinion).

In that respect, in both its terms and purpose, the RFOA provision parallels the judicially recognized "legitimate, nondiscriminatory reason" defense used in disparate treatment cases under both the ADEA and Title VII. In those cases, the Court has long recognized that a defendant can rebut a plaintiff's prima facie disparate treatment claim by identifying a legitimate, non-discriminatory reason for the employment action. While the defendant bears the burden of producing that reason, the burden of persuasion and proof that the proffered reason is not legitimate or is not non-discriminatory remains with the plaintiff. See, *e.g.*, *Reeves*, 530 U.S. at 142; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981).

The RFOA provision serves the same function with respect to disparate impact claims under the ADEA and, in fact, "plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor." *Smith*, 544 U.S. at 239 (plurality

opinion). In fact, the Court reasoned in *Smith* that the existence of the RFOA provision itself supported recognition of disparate impact claims, because Congress's requirement that the employer's decisionmaking factor be "reasonable" implied that, in the absence of disparate treatment, only the use of *unreasonable* non-age factors could support liability under the ADEA. *Id.* at 239 & n.11 (plurality opinion). That is because the unreasoned use of factors having a substantially disparate impact on protected employees could support an inference of discrimination, and tolerating a disparate impact based on such an "insubstantial justification * * * would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." *Wards Cove*, 490 U.S. at 659.

On the other hand, as long as the non-age factor is reasonable, no such inference of "discrimination against [the] protected group" is permitted under the ADEA, *Wards Cove*, 490 U.S. at 659, and the claim of discrimination "because of age" fails, regardless of the extent of the impact on older workers or the existence of alternative means to accomplish the employer's goals. *Smith*, 544 U.S. at 239 (plurality opinion). The RFOA provision thus sharply defines and delimits the scope of disparate impact claims under the ADEA, foreclosing a finding of discrimination "because of age" any time the disparate impact is attributed to a reasonable non-age factor. *Id.* at 243.

That direct and definitional correspondence between the terms of a disparate impact claim and the RFOA provision means that the RFOA "redefines the elements of a plaintiff's prima facie case instead of

establishing a defense to what otherwise would be a violation of the Act." *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989). Just as the "legitimate, nondiscriminatory" defense counters the elements of a prima facie disparate-treatment case, the RFOA and the elements of a disparate-impact claim are mutually negating: the RFOA denies the plaintiff's case on its own terms. That is not an affirmative defense, but a traditional defensive response to a plaintiff's evidence that leaves the burden of proof right where it started – on the plaintiff.

Petitioners rely heavily (Br. 25-32) on Congress's placement of the RFOA provision in Section 623(f) alongside the affirmative defense of a "bona fide occupational qualification." But it is a cardinal principle of statutory construction that a single statutory provision should not be read in isolation, and that the statute must be read as a whole. *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007). When the RFOA provision is lined up against the ADEA's basic liability provision, the RFOA, by it terms, serves to negate and deny the central element of the plaintiff's claim – that is, that the adverse employment action is because of age. Cf. *Betts*, 492 U.S. at 181 (concluding that a provision of the ADEA that "appears on first reading to describe an affirmative defense," actually "delineates which employment practices are illegal and thereby prohibited and which are not" when the statute is considered as a whole).

Underscoring the point, the Court in *Smith* upheld dismissal of the police officers' disparate impact claim at the summary judgment stage because it was "clear

from the record that the City's plan was based on reasonable factors other than age." 544 U.S. at 241. That clarity meant not that the City had incontrovertibly established an affirmative defense, but that the plaintiffs had "not set forth a valid disparate-impact claim." *Id.* at 232.[6]

3. *Wards Cove* And *Smith* Confirm That The Burden Of Proof Remains With The Plaintiff

In *Wards Cove*, *supra*, this Court identified the key elements of a Title VII disparate impact case, and explained how the burdens of persuasion and production would be allocated. The Court first held that, to establish a prima facie case of discrimination on disparate impact grounds, a plaintiff must both demonstrate the existence of a "significant[]" statistical disparity and "isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove*, 490 U.S. at 656. Once that prima facie case is established, the burden shifts to the employer to produce evidence that the challenged employment practice has a business justification and, more particularly, that the practice "serves, in a significant way, the le-

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[6] Contrary to petitioners' argument (Br. 25), the Equal Pay Act, 20 U.S.C. 206(d)(1), is of little relevance because, as *Smith* explains, there is no disparate impact liability under that statute. See *Smith*, 544 U.S. at 239 n.11. Beyond that, the plaintiff's prima facie case in an Equal Pay Act case requires far more exacting proof of discriminatory treatment than the statistical correlation with age at issue here, and thus raises a far more substantial basis for inferring discrimination on the basis of sex and shifting the burden of proof to the defendant. See generally *County of Washington v. Gunther*, 452 U.S. 161 (1981).

gitimate employment goals of the employer." *Id.* at 659. While the employer has the burden of production for business justification, "[t]he burden of persuasion * * * remains with the disparate-impact plaintiff." *Ibid.* The plaintiff's demonstration of a prima facie case of disparate impact does not relieve the plaintiff of "[t]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice." *Ibid.* Keeping the burden of proof on the plaintiff, the Court explained, not only accords with "the usual method for allocating persuasion and production burdens in the federal courts," but also "conforms" disparate impact cases "to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." *Id.* at 659-660.

While Congress subsequently amended Title VII to alter the *Wards Cove* method of proving disparate impact claims, Congress did not amend the ADEA "or speak to the subject of age discrimination." *Smith*, 544 U.S. at 240. Thus, *Wards Cove*'s "interpretation of Title VII's identical language remains applicable to the ADEA," *ibid.*, and, under that paradigm, the burden of proving that the employer's practice resulted in discrimination because of age, rather than because of some non-protected status (such as seniority), "remains with the plaintiff *at all times*." *Wards Cove*, 490 U.S. at 659.

Accordingly, just as in *Wards Cove*, the plaintiff's job is not done in an ADEA case when it proves a prima facie case of statistical disparity and identifies

the allegedly culpable employment practice. True, the statistical case shifts the burden to the employer to identify a "reasonable factor other than age" that caused the disparity – RFOA being the ADEA's less-exacting version of the business justification requirement at issue in *Wards Cove*. But the burden of persuasion and of ultimately proving that there was discrimination on the basis of age, rather than on a non-age ground, remains "*at all times*" with the plaintiff. *Wards Cove*, 490 U.S. at 659.

Petitioners argue (Br. 49) that the *Wards Cove* model is not applicable because the RFOA does not exist under Title VII, and thus the language of the two statutes is not "identical," *Smith*, 544 U.S. at 240. That is true, but of no help to petitioners for three reasons. First, the language that is most relevant and controlling for burden-of-proof purposes is the language creating the disparate-impact cause of action, which the ADEA adopted "*in haec verba*" from Title VII, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), including the identical requirement under each statute that the plaintiff prove that discrimination occurred "because of" a protected status (such as race, sex, or age). See 42 U.S.C. 2000e-2(a); 29 U.S.C. 623(a)(2). The RFOA, just like the business justification rule under Title VII (prior to the 1991 amendment), is a form of evidence that negates the inference arising from the prima facie disparate-impact case that the adverse employment action was "because of" a protected status. Both are thus responses to – denials of – the plaintiff's proof, which, in the absence of congressional direction to the contrary, leave the burden of discounting the defense

evidence and proving the requisite causation squarely on the plaintiff's shoulders.

Second, the RFOA is virtually identical in both terms and function to the rule under the ADEA (as well as Title VII) that a "legitimate, non-discriminatory" reason for employment action, once articulated by the employer in a disparate treatment case, must be disproven by the plaintiff. See *Reeves*, 530 U.S. at 142; *Burdine*, 450 U.S. at 254-255. The Court in *Wards Cove* specifically determined that the burden of proof in disparate impact cases should "conform[] to the rule in disparate-treatment cases" where "the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." 490 U.S. at 660. In the ADEA, the RFOA does exactly that, and statutorily closes the gap between proof of disparate-treatment and proof of disparate-impact cases. Just as an employer's legitimate non-age-based reason is a defense to disparate-treatment claims, so also is a reasonable non-age-based reason a defense to disparate impact claims. And, as *Wards Cove* indicated, *ibid.*, the burden of proving each of those defenses should be the same. Cf. *Fort Worth*, 487 U.S. at 987 (plurality opinion of O'Connor, J.) ("Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination.").

Third, the Court in *Smith* itself did not hesitate to apply the *Wards Cove* model to the RFOA provision, notwithstanding the textual difference between Title VII and the ADEA. See 544 U.S. at 241; see also *id.*

at 267 (O'Connor, J., concurring) ("agree[ing] with the Court" that, if permitted, ADEA disparate impact claims "are governed by the standards set forth in our decision in *Wards Cove* * ** [which] means that once the employer has produced evidence that its action was based on a reasonable nonage factor, the plaintiff bears the burden of disproving this assertion"). That makes sense because, as *Smith* explains, the whole point of the RFOA is to *reduce* the burdens employers face in justifying their practices and to narrow the scope of disparate-impact claims. *Ibid.* It thus would be illogical for the ADEA's statutory adoption of the more *employer-protective* RFOA provision, rather than the Title VII business justification rule, to result in the imposition of a *greater burden of proof* on employers in ADEA cases than employers faced in Title VII cases under *Wards Cove*.

B. Keeping The Burden Of Proof On The Plaintiff Comports With The ADEA's More Modest Limitations On Employment Decisionmaking And Has Proven To Be Workable

1. The RFOA Provision Reflects That Many Employment Practices Having A Disparate Impact Are Reasonable

Where the burden of proof for the RFOA provision is placed must comport with the careful balance Congress struck in the ADEA between combating irrational age barriers and stereotypes and preserving the flexibility and discretion that employers need to ensure their workforce can compete in the modern economy. See S. Rep. No. 107-158, ch. 4(A)(3)(a)

(2002) (Act seeks "to balance the right of older workers to be free from age discrimination in employment with the employer's prerogative to control managerial decisions"). In enacting the ADEA, Congress recognized that older workers, "unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment,'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000), and they face "little discrimination arising from dislike or intolerance of older people," *Smith*, 544 U.S. at 232. Quite the opposite, aging is a natural human condition, and Congress knew that "all persons," including the managers adopting employment criteria and making employment decisions, "if they live out their normal life spans, will experience it." *Kimel*, 528 U.S. at 83. Moreover, unlike the protected groups in Title VII, Congress was not confronting in the ADEA an established pattern of facially neutral tests or standards being used either to perpetuate the effects of past discrimination or to circumvent prohibitions on disparate treatment. See *Smith*, 544 U.S. at 240-241; *id.* at 258-259 (O'Connor, J., concurring).

The problem of age discrimination thus is "different in kind from discrimination on account of race" or gender. *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004). Congress's central concern was with preventing "arbitrary" discrimination arising from unwarranted age limits or stereotypical assumptions about the abilities of older workers. See *Smith*, 544 U.S. at 232. At the same time, Congress was aware that age, while sometimes employed in an arbitrary manner, "not uncommonly has relevance to

an individual's capacity to engage in certain types of employment." *Id.* at 240. In addition, Congress knew that a variety of criteria that are "routinely used" by employers "may be reasonable despite their adverse impact on older workers as a group." *Id.* at 241. For those reasons, in enacting the ADEA, Congress expressly tempered the statute's reach by providing that any employer action that is based not on age, but on reasonable factors other than age, remains permissible. 29 U.S.C. 623(f)(1). The RFOA provision thus "reflects th[e] historical difference," *Smith*, 544 U.S. at 241, between age and other protected statuses and, to that end, "significantly narrow[s]" the ADEA's coverage in general, *id.* at 233, and the scope of disparate impact claims in particular, *id.* at 240.

The ADEA's acceptance of all employment practices based on reasonable non-age factors, regardless of how significantly a practice burdens older workers, demonstrates that even substantial statistical disparities in an employment practice's effect do not inspire the same suspicion or automatic need for justification that they do when race or gender is at issue. Because the probative force of statistics alone is of such limited evidentiary value in the age context, relieving the plaintiff at this early juncture of its burden to prove that the alleged discrimination was because of age could "result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances." *Smith*, 544 U.S. at 241 (quoting *Wards Cove*, 490 U.S. at 657). Tellingly, in the absence of express congressional direction, such a statistical prima facie case was insuffi-

cient to shift the burden of proof of race discrimination to the employer in *Wards Cove*, even though history and experience cast a much more skeptical eye on such disparities. There is no sound basis for a different rule under the ADEA, where any disparate impact on older workers is far less suspect, and where Congress has dictated, through the RFOA, broader latitude for employers' decisionmaking. In short, the statutory scheme that Congress carefully designed in the ADEA would make little sense if employers bore the burden of proving that decisions that Congress recognized will generally be run-of-the-mill and non-discriminatory are, indeed, run-of-the-mill and non-discriminatory. See Pet. App. 13a ("It would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable.").

2. Petitioners' Burden-Of-Proof Scheme Would Be Unworkable

Perhaps recognizing that a statistically disparate impact on workers over 40 alone casts little doubt on the legitimacy of the employer's practice – and thus would not, on its own, warrant imposing the burden of proving non-liability on the employer – petitioners argue (Br. 47-48) that the burden would not shift until after a lack of business justification had been established under the *Wards Cove* framework. Thus, in petitioners' view, after the plaintiff proves a significant statistical disparity, the burden would shift to the defendant to articulate a business justification for the challenged employment practice, and then the burden would shift back to the plaintiff to prove the absence of such justification or pretext, and then

back to the defendant to prove reliance on a reasonable non-age factor. But that multi-pronged proof scheme would be unwieldy to apply, lacks any basis in the ADEA, and makes little sense in practice.

First, *Smith* held that, under the ADEA, the RFOA provision displaces the business justification test with a less-exacting and more employer-protective reasonableness inquiry. 544 U.S. at 241-243. The RFOA thus does not, as petitioners posit, tag along as a fall back to be invoked only if business justification is disproven. Instead, by enacting the RFOA, Congress eliminated altogether in the ADEA any inquiry into either the actual necessity of the business practice or the availability of alternative means for the employer to achieve its goals. *Id.* at 243; see U.S. Br. 26 ("The ADEA provides no textual basis for asking *both* whether a challenged employment practice is supported by business justification *and* whether it is based on reasonable factors other than age.").

Second, petitioners' multi-layered approach makes little sense. Every non-age based business justification identified by an employer for an employment practice would necessarily subsume a reasonable non-age factor for the decision. The employer's articulation of the one would necessarily include the other. There would be no point to dragging employers through months or, as in this case, years of resource-consuming discovery and litigation over the harder question of whether the factor rose to the level of business necessity and what alternatives were available (if any), when the ADEA requires only that the non-age factor be reasonable. The RFOA is de-

signed to curtail disparate impact liability and to protect the reasonable business judgments of employers, not to force employers and courts to spend scarce resources running around Robin Hood's barn.

By contrast, leaving the burden of proving that the disparate impact is because of age, and not some reasonable non-age factor, on the plaintiff would be simpler and readily workable. Petitioners, in fact, admit their ability to bear the burden of proof on business justification. If plaintiffs can bear the burden of persuasion on the necessity of employment criteria to the business and the existence of alternative measures that have a less differential impact, then they surely can bear the more straightforward burden of contesting reasonableness. Indeed, across the law in a wide variety of areas, plaintiffs are routinely called upon to contest the reasonableness of a defendant's actions. More to the point, plaintiffs already bear the burden of proving in ADEA disparate treatment cases that the defendant's actions were not attributable to a legitimate, nondiscriminatory reason. There is no reason they cannot do what is functionally the same thing in disparate impact cases.

3. Shifting The Burden Of Proof Would Substantially Erode The Discretion The ADEA Left To Employers

As both *Wards Cove* and Congress's reaction to that decision underscore, where the burden of proof is placed in employment discrimination cases has important implications for employer flexibility and business decisionmaking. Given the long history of invidious discrimination in employment on the basis

of race, ethnicity, gender, and religion, see, e.g., *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 465 (1986), and the fact that reasonable business judgments do *not* naturally or commonly correlate with significant differentiation along racial or gender lines, Congress understandably casts a more skeptical eye on employment practices that result in or perpetuate race and gender disparity in the workplace. The ADEA, by contrast, operates against a very different backdrop, in which Congress recognized that employment decisions based on age themselves are "not uncommonly" relevant, and that many other reasonable and sensible employment criteria correlate significantly with age. See *Smith*, 544 U.S. at 240-241. What is more, the majority of employees are over the age of 40, http://www.bls.gov/web/cps/cpsaat3.pdf, which means that, as a matter of ordinary statistics, most employer practices will affect more workers over 40 than under 40. Congress thus enacted the RFOA provision to ensure a wide berth for reasoned and reasonable employer judgments.

Preserving such employer flexibility and discretion is vital in the modern economy. The rapid advancement of technology and globalization of the economy have forced businesses to restructure, reorganize, and reduce their workforces to compete and to survive economically. One unfortunate aspect of that process has been the widespread need for reductions in force. "As global competition increases and improvements in technology accelerate, U.S. corporations must respond in order to maintain * * * their

position in the international marketplace. As human capital becomes superseded by technological efficiencies, the result of downsizing is inevitable." Ira M. Millstein, *The Responsible Board*, 52 BUS. LAW. 407 (1997).[7] According to the Department of Labor, in 2007 alone, businesses engaged in 15,493 "mass layoff events," defined as layoffs of 50 or more employees, resulting in the separation of over 1.5 million employees.[8] In the first two months of 2008, employers engaged in 3,110 mass layoff actions, affecting 321,485 employees.[9]

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[7] See also Theodore Hershberg, *Defining the Challenge: Human Capital Development – America's Greatest Challenge*, 544 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 46 (1996) ("To stay competitive in the global economy, corporate America has been engaged in a dramatic downsizing process."); Robert Goldscheider, *Entrepreneurialism: The Engine that has Helped the United States Regain World Leadership – An Example for Japanese Industry*, 39 IDEA 507, 519 (1999) ("Corporate downsizing * * * has helped make American companies more efficient and competitive."); Carol B. Swanson, *Antitrust Excitement in the New Millenium: Microsoft, Mergers, and More*, 54 OKLA. L. REV. 285, 300 & n.110 (2001) ("Market globalization also imposes competitive pressures on domestic businesses to become bigger, better, and more efficient * * *. Because of these competitive pressures, companies engage in downsizing and consolidation to become more efficient."); Thomas H. Vickers, *Advising Financially Troubled Entities*, 5 S. CAL. INTERDISC. L.J. 469, 477 (1997) ("Plant closings, mass layoffs, and reductions in force * * * have become commonplace in the more competitive economic world confronted by employers.").

[8] See http://www.bls.gov/news.release/archives/mmls_01242008.pdf.

[9] See http://www.bls.gov/news.release/archives/mmls_02272008.pdf; http://www.bls.gov/news.release/archives/mmls_03212008.pdf.

Faced with such economic pressures, now more than ever, employers need the substantial flexibility and discretion in streamlining the workplace that the RFOA provision seeks to preserve.[10] But, as this Court has recognized, many such reductions and layoffs are likely to have a disproportionate effect on older workers because "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."—*Smith*, 544 U.S. at 240. In addition, numerous factors of importance to employers in the modern economy correlate with age, including technology-based skills, education levels, physical ability, and entitlement to benefits, such as salary, vacation time, pension status, retirement eligibility, and seniority.[11] Indeed, because "[v]irtually all elements of a standard compensation package are positively correlated with age," "many employer decisions that are intended to cut costs or respond to

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[10] See, *e.g.*, Guillermo Rotman, *Shared Office Providers Deliver Cost Savings and Flexibility*, 39 AREA DEVELOPMENT SITE AND FACILITY PLANNING 30 (Apr. 2004) ("Organizations . . . need the flexibility to locate, relocate, upsize, or downsize in order to meet market conditions."); Roger L. Schantz, *Current Issues in Insurance Law, Comment, Lapeer Foundry: The NLRB Closes the Door on Unilateral Economic Layoffs*, 51 OHIO ST. L.J. 1049, 1062 (1990) ("Speed and flexibility are extremely important in the decision to implement economic layoffs.").

[11] See *Smith*, 544 U.S. at 259 (O'Connor, J., concurring) ("[A]dvances in technology and increasing access to formal education often leave older workers at a competitive disadvantage vis-à-vis younger workers."); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315 (1976) (per curiam); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951, 952 (8th Cir. 1999); *Allen v. Diebold, Inc.*, 33 F.3d 674, 676 (6th Cir. 1994); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 876 (6th Cir. 1990).

market forces will likely have a disproportionate effect on older workers." *Id.* at 259 (O'Connor, J., concurring).

Employers, of course, cannot use age as a proxy for those considerations. The point of the ADEA was to make employers "focus on those factors directly," *Kimel*, 528 U.S. at 88, but not to preclude use of such factors altogether. See *EEOC v. Wyoming*, 460 U.S. 226, 232-233 (1983) ("[I]n order to insure that employers were permitted to use neutral criteria not directly dependant on age * * * the Act provided that certain otherwise prohibited employment practices would not be unlawful * * * 'where the differentiation is based on reasonable factors other than age.'"); *Allen*, 33 F.3d at 677 ("The ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations.").

Adopting a litigation model and proof scheme under the ADEA that casts a cloud of suspicion over the use of such factors by transferring the burden of proving non-liability to the employer just because of a factor's statistical correlation with age would ignore the balance Congress struck and the workplace realities against which it legislated. Shifting the burden of proof will also make it harder for courts to dispose of cases before discovery and trial, forcing employers to devote already strained resources to litigation rather than business development. What is worse, the practical effect of a proof scheme that presumptively equates age correlation with age discrimination will be to chill employers' use of the broad swath of

legitimate employment criteria that happen to correlate with age and to hamstring employers' ability to respond quickly and efficiently to changing economic pressures and developments. Those consequences, in turn, will decrease business efficiency and competitiveness, which could ultimately lead to even more job losses.

Petitioners, at bottom, want enforcement of the ADEA to mirror enforcement of Title VII following the 1991 amendments. But Congress deliberately did not write the ADEA that way, and chose in 1991 not to amend the ADEA to parallel Title VII. See *Smith*, 544 U.S. at 240-241. The text of the two statutes, the respective histories of age and race or sex discrimination, and the economic and demographic realities of the workforce are significantly different, and the burden of proof in ADEA cases must respect those differences.[12]

C. *No Deference Is Owed To The EEOC's Litigating Position*

Petitioners (Br. 38-44) and the United States argue (Br. 15-21) that the Court should defer to the EEOC's view, as expressed in its brief in this case, that the burden of proof under the RFOA provision rests with the employer. No such deference is appropriate because the relevant regulatory texts and history suggest the opposite and, in any event, the bur-

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[12] See *Smith*, 544 U.S. at 236 n.7 (plurality opinion) (noting that "the differences between age and the classes protected in Title VII are relevant, and that Congress might well have intended to treat the two differently," particularly when "coupled with a difference in the text of the statute such as the RFOA provision") (emphasis omitted).

den of proof in a judicial proceeding to which the EEOC itself may be a party is not the type of issue for which the agency's judgment should receive deference.

First, contrary to the government's litigation position before this Court, the better reading of the relevant regulatory texts and history supports placing the burden of proof under the RFOA provision on the plaintiff. The EEOC's regulation addressing litigation of the RFOA provision, 29 C.F.R. 1625.7, does not directly address the burden of proof in disparate impact cases. But Section 1625.7(d) does provide that, when an employment practice has a disparate impact on older workers, the "factor other than age" must "be justified as a business necessity." *Wards Cove*, in turn, held that the burden of proving business necessity is on the employee, 490 U.S. at 659-660, and *Smith* confirmed that the *Wards Cove* model continues to apply to the unamended ADEA, 544 U.S. at 240. The EEOC has amended its regulation twice in the nine years since *Wards Cove* and the three years since *Smith*, see 72 Fed. Reg. 36,875 (July 6, 2007); 72 Fed. Reg. 72,944 (Dec. 26, 2007), but has never changed its rule that RFOA should be proven in the same manner as business justification, which *Wards Cove* placed on the plaintiff and *Smith* left there for purposes of the ADEA. Cf. 73 Fed. Reg. 16,807 (Mar. 31, 2008) (proposing for the first time – and after the filing of the government's brief in this case – to amend the regulation). Thus, the EEOC regulation endorses a litigation model that, under this Court's precedent, is most fairly read as leaving the RFOA burden of proof on the plaintiff. Subse-

quent unpublished, litigation-inspired, interpretive positions cannot conflict with that plain regulatory text. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (no deference would be owed to an agency's interpretation of its own regulation if it was "inconsistent with the regulation" itself).[13]

Second, subsection (e) of the regulation provides that, in disparate *treatment* cases, "the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. 1625.7(e); see 73 Fed. Reg. 16,807, 16,808 (Mar. 31, 2008). That provision reinforces – as the preceding subsection 1625.7(d) indicates – that the burden of proving RFOA in disparate impact cases is on the plaintiff. Otherwise, there was no reason for the regulation to carve out, by way of contrast and structurally separate from the preceding disparate impact subsection, a specific burden of proof rule for disparate treatment cases only. Moreover, "disparate impact" and "disparate treatment" are terms of art in civil rights law. Just as Congress is presumed to be aware of and to adopt the established meaning of le-

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[13] The government asserts (Br. 16) that the EEOC's invocation of the "business necessity" model "takes a position that does not survive *Smith*." See also 70 Fed. Reg. 65,360-61 (Oct. 31, 2005). That is certainly true with respect to the substantive standard by which the disparate impact claim is measured, but nothing in *Smith* undermines the underlying regulatory judgment about where the burden of proving the ADEA's equivalent to "business necessity" – the RFOA provision – falls. Alternatively, if the EEOC's position is that the entire regulatory provision is now invalid due to the EEOC's long-term and fundamental misunderstanding of the RFOA provision, the EEOC is ill-positioned to claim deference to their reading of a statutory provision that they have so profoundly misunderstood for so long.

gal terms of art used in legislation, *Corning Glass Works v. Brennan*, 417 U.S. 188, 201-202 (1974), it strains the regulatory text to the breaking point for the EEOC to argue that the phrase "discriminatory treatment" includes "disparate impact."[14]

The regulatory history confirms that commonsense conclusion. As originally proposed, the draft regulation spoke more broadly and assigned the RFOA burden of proof to employers without restricting it to disparate treatment cases. 44 Fed. Reg. 68,858, 68,861 (Nov. 30, 1979) ("The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer."). The specific limitation to "disparate treatment" cases thus was specifically and deliberately added by the EEOC after further consideration and public comment on the draft regulation. See 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981). Whatever interpretive discretion the EEOC has under the ADEA, it cannot adopt through litigation interpretations of statutory text that specifically failed to survive the regulatory process *and* that are in tension with the text of the regulations as promulgated. See *Thomas Jefferson Univ.*

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[14] For purposes of this case, the Court need not decide whether the EEOC's rule concerning the burden of proof in disparate treatment cases is proper. The regulation's reference to the burden to prove the claim "factually" is most naturally read as referring only to the burden of production. If the regulation reaches further, however, then the defensibility of the EEOC's view would be in substantial doubt, given that the plaintiff already bears the burden of disproving the existence of a "legitimate, nondiscriminatory reason" for the employment action in disparate treatment cases under the ADEA. *Reeves*, 530 U.S. at 142, and there is no sensible basis for distinguishing between that burden and the RFOA burden.

v. Shalala, 512 U.S. 504, 512 (1994) (no deference is owed where an "alternative reading is compelled * * * by other indications of the Secretary's intent at the time of the regulation's promulgation").

Petitioners (Br. 41) and the government (Br. 18) contend that Congress ratified the EEOC's allocation of the burden of proof in 1990 when it enacted the Older Workers Benefits Protection Act (OWBPA), Pub. L. No. 101-433, § 101, 104 Stat. 978. If that is true, that would hurt rather than help petitioners. That is because, shortly before enactment of the OWBPA and any alleged ratification, this Court had held that the burden of proving business necessity in disparate impact cases falls on the plaintiff. See *Wards Cove*, *supra*. Thus, to the extent Congress focused on the issue at all, it is much more likely that they were aware of and ratified the EEOC's *published regulation* equating the models for RFOA and business necessity proof, as read in light of this Court's decision in *Wards Cove* (a decision well known to Congress) holding that the burden of proving business necessity remains with the employee.[15] There is certainly no sound basis for concluding that Congress acquiesced in the EEOC's unwritten position that a civil-rights term of art like "discriminatory treatment" in 29 C.F.R. 1625.7(e) means both "disparate treatment" and "disparate impact." See *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994); *Corning Glass Works*, 417 U.S. at 201-202; cf. *Cline*, 540

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[15] That understanding is strengthened by this Court's observation in *Smith*, 544 U.S. at 240, that Congress left the *Wards Cove* model intact for the ADEA.

U.S. at 600 (no deference owed to EEOC position under the ADEA that "is clearly wrong").[16]

Finally, and in any event, there is a substantial question whether the EEOC is entitled to deference on the burden of proof question. The deference due an agency interpretation turns, in the first instance, "on whether the matter is more properly viewed as within the agency's expertise or, on the contrary, as a clearly legal issue that courts are better equipped to handle." *Dion v. Secretary of Health & Human Servs.*, 823 F.2d 669, 673 (1st Cir. 1987). While the ADEA assigns the EEOC an informal conciliation role in administering the statute, 29 U.S.C. 626(d), the ADEA does not require administrative adjudication of claims by the EEOC as a prerequisite to judicial review. See 29 C.F.R. 1614.201. Where the burden of proof falls for the RFOA provision thus does not implicate any adjudicatory expertise statutorily assigned to the EEOC. Contrast *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001) (deferring to agency determination of where burden of proof fell on an issue adjudicated by the agency in administrative proceedings that are mandated to precede judicial review). Nor does the RFOA burden of proof issue entail the interpretation and construction of ambiguous language in any specific statutory provision, see *Federal Express Corp. v.*

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[16] The other potential reading of the OWBPA is that it said nothing at all about the burden of proof under the RFOA provision. See 136 Cong. Rec. 25,353 (1990) ("Because the allocation of the burden of proof under paragraph 4(f)(1) was not at issue in *Betts*, the managers find no need to address it in this bill."). That would not help petitioners either.

Holowecki, 128 S. Ct. 1147, 1154 (2008), because the text of the ADEA does not expressly address the burden of proof.

Instead, the burden of proof issue pertains to how claims will be proven in courtroom litigation, which is a matter that falls "within the peculiar expertise of the judiciary." *Midland Coal Co. v. Office of Workers' Comp. Programs*, 149 F.3d 558, 561 (7th Cir. 1998). Indeed, "[w]here Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard, for '[it] is the kind of question which has traditionally been left to the judiciary to resolve.'" *Steadman v. SEC*, 450 U.S. 91, 95 (1981) (quoting *Woodby v. INS*, 385 U.S. 276, 284 (1966)); see also *Greenwich Collieries*, 512 U.S. at 272-281 (no deference to agency allocation of burden of proof under the Administrative Procedure Act). [17]

The claim to deference to a litigation position is particularly weak when, as here, the agency is itself charged with litigating the very type of claims at issue in court. Principles of agency deference less logically extend to an agency's interpretative determina-

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[17] Cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 640, 649 (1990) (declining to defer to agency's position on "whether exclusivity provisions in state workers' compensation laws bar migrant workers from availing themselves of a private right of action under [a federal statute]"); *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996) ("A statute of limitations is not a matter within the particular expertise of the INS. Rather, we consider this 'a clearly legal issue that courts are better equipped to handle.'"); *Lynch v. Lyng*, 872 F.2d 718, 724 (6th Cir. 1989) (no deference to agency's position on the effective date of a statute).

tion to relieve itself of affirmative litigation burdens. Cf. *Holowecki*, 128 S. Ct. at 1156-1157 (deferring to EEOC litigation position when there is "no reason to assume the agency's position * * * was framed for the specific purpose of aiding a party in this litigation"); *Kentucky River*, 532 U.S. at 712 (deferring to agency's burden-of-proof rule for "supervisory" status where such status "is not an element of the Board's claim"). At a minimum, given the EEOC's self-interest, deference on such burden of proof questions should be conditioned on full and formal agency deliberation through either the rulemaking process or the formal administrative adjudicatory process. Here, of course, the only regulations on the books are best read as leaving the burden of proof in disparate impact cases on the plaintiff.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 06-1505 4-11-08

In The
Supreme Court of the United States

CLIFFORD B. MEACHAM *et al.*,

Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE EMPLOYMENT AND LABOR LAW COMMITTEE OF THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Association of Corporate Counsel ("ACC") is the in-house bar association, serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. Since its founding in 1982, the ACC has grown to include more than 23,000 individual in-house counsel members who work in more than 9,000 business entities worldwide. In the United States, ACC members are at work in every one of the Fortune 100 companies.

One of the primary missions of the ACC is to act as the voice of the in-house bar on matters of concern to corporate legal departments, and matters implicating the ability of its members to fulfill their functions as legal counselors to their corporate clients.

The Employment and Labor Law Committee of The Association of Corporate Counsel ("the Committee") is one of the Association's largest committees, with over 5,000 attorney members. Most of those who are members of the Committee function as in-house counsel on workplace law issues, advising employers with respect to employment litigation and counseling with respect to personnel actions.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than The Association of Corporate Counsel, its members, and its counsel, made such a monetary contribution.

SUMMARY OF ARGUMENT

The Employment and Labor Law Committee of The Association of Corporate Counsel ("the Committee") believes that the Second Circuit was correct in concluding that an employee alleging disparate impact discrimination under the Age Discrimination in Employment Act ("the ADEA") bears the burden of proving that the employer's justification for the challenged employment action is unreasonable. The Committee concurs with the argument advanced by the Respondents.

The Committee believes that the alternative formulations of the test, as advanced by Petitioners and the government, are flawed and unworkable. As this Court held in *Smith v. City of Jackson*, 544 U.S. 228 (2005) the "business necessity" test is not applicable in an ADEA disparate impact case; rather, the appropriate test is that of "reasonableness." An employer is not liable for disparate impact discrimination under the ADEA so long as the employer's actions, taken in reliance upon reasonable factors other than age, constituted a reasonable means to achieve the employer's legitimate business objectives. Once the employer has satisfied the burden of producing evidence of a legitimate business justification for its action, the employee must ultimately be the one with the burden to persuade the factfinder that the employer's asserted basis for the neutral policy is unreasonable.

The Committee believes that adoption of the test advanced by Petitioners, or that advanced by the government, will encourage disparate impact claims and litigation where *any* statistical evidence may support a disparate impact claim of age discrimination. Treating the "reasonable factors other than age" as an affirmative defense on which the employer has the burden of proof would render it vastly more difficult for courts to identify and dispose of meritless cases through summary judgment. As every hour of litigation is costly both to the parties and the taxpayers, this expense should not be incurred needlessly. Indeed, despite the express recognition by Congress in the ADEA that actions taken on the basis of "reasonable factors other than age" are not unlawful, if required to prove the reasonableness of their personnel actions affirmatively, employers will likely be discouraged from engaging in a thoughtful analytical process like that utilized by Respondent, when called upon to make difficult personnel decisions affecting groups of employees, such as the selection of those to be affected by a reduction-in-force. In the interests of reducing the risk of litigation and attendant costs, employers may be motivated to permit a statistical analysis to determine the selection process, thus having the unintended consequence of *making* age a factor in personnel decisions in order to reduce the risk of litigation under a statute purporting to prohibit consideration of that very factor.

ARGUMENT

THE SECOND CIRCUIT'S ANALYSIS IS CORRECT AND THE JUDGMENT BELOW SHOULD BE AFFIRMED

A. The Second Circuit Correctly Placed Upon the Employee the Burden of Proving That the Employer's Justification Is Unreasonable.

The Second Circuit stated:

> First, we consider who bears the burden of persuasion with respect to the "reasonableness" of the employer's proffered business justification under the ADEA disparate-impact framework. The best reading of the text of the ADEA – in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable. *See Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) (holding that under City of Jackson, once employer has satisfied burden of producing evidence of legitimate business justification, to prevail "employee must ultimately persuade the factfinder that the employer's asserted basis for the neutral policy is unreasonable").

Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 141 (2d Cir. 2006).

In reaching this conclusion, the Court identified several factors, but emphasized one:

> *City of Jackson* reasoned that the "narrower" scope of disparate-impact liability under the ADEA (as compared with Title VII) is justified because "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment," and that as a result, "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *City of Jackson*, 544 U.S. at 240-41. *It would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable. . . . [Therefore, an ADEA plaintiff cannot] prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable.*

Meacham, 461 F.3d at 142-43 (emphasis added)

The Committee believes that the Second Circuit's analysis is correct, and should be affirmed. The Committee concurs with the arguments which have been advanced by the Respondents in Argument section I.

B. The Tests Which Are Advocated by the Petitioners and the Government Are Flawed and Unworkable.

In addition to being legally flawed for the reasons stated by Respondents in their brief, the position advanced by the Petitioner should be rejected by this Court because it would give undue weight to statistical age disparities created by legitimate business decisions and would prevent the early judicial resolution of meritless claims. Great care must be exercised in the weight that is given to statistical analyses conducted with respect to a reduction in force (RIF). A cautious employer may analyze projected RIF selections for evidence of adverse impact in order to evaluate whether there is or may be a pattern of selections which might support a statistical case of discrimination. However, as several commentators have observed, there are considerable risks in performing such an analysis and the results of even a well-planned statistical study may raise questions to which there are no easy answers.

As one commentator observed:

> The ideal case occurs if the statistical report card contains only passing grades (*i.e.*, no statistically significant disparities appear that are adverse to any protected group). In that happy but unlikely case, an employer may proceed in the knowledge that it has in hand powerful evidence of a nondiscriminatory motive. The fortunate employer can testify that it recognized that even neutral

> decision making can adversely affect one or more protected groups; that it has carefully considered that issue, perhaps with the assistance of a highly qualified expert, and that it implemented the RIF only after it determined there was no adverse impact against any protected group.
>
> The reality is that such a result is the equivalent of winning the "RIF lottery" – so rare that no employer planning a large RIF can bank on this outcome. Rather, a contrary result is far more likely: the employer's initial RIF selections will adversely affect, statistically speaking, some protected group at some level of its organization. . . . [E]mployers generally cannot "reverse engineer" a large-scale RIF. That is, it usually will not be possible, and it undoubtedly is unlawful, first to create a demographic profile of a "balanced" RIF and then to select employees according to their demographic characteristics. Legal considerations aside, there simply are too many permutations when a company's organizational structure (*i.e.*, its divisions, plants, departments, and job classifications) is combined with the various protected classifications (*e.g.*, race, gender, ethnicity, etc.) to prescribe RIF selections that produce no statistical imbalances.

Allan G. King, *Statistics as a Guide to RIF Selections: Caveat Emptor*, 20 Lab. Law. 79, 80-81 (2004).

Recognizing the inference that arises from statistical evidence of a disparate impact created by a

challenged employment practice, another commentator observed:

> If the plaintiff can establish the prima facie case, employer-defendants are then forced to defend the RIF in court. The use of statistics is a circumstantial method of proof that the employer intended to discriminate in the RIF. Statistics that open the door may be available in a wide variety of cases because so many factors, on which many RIFs are routinely based, are associated with age. Consider, for example, the correlation of age with pension, benefits, and salary. The high costs associated with these factors are often motivating forces in designing a RIF. While each of these factors is considered a reasonable factor other than age, statistical data alone are sufficient information to begin a claim and force the employer to defend its action. Such data are particularly the type of information that discharged employees could request because a RIF based on these considerations would indicate that the action had a disparate impact on older employees.
>
> Thus, an employer, looking at statistical information that indicates that the planned RIF may have an adverse impact on older employees, may consider revising the RIF to avoid the possible legal challenge. However, employers may face additional problems in revising the RIF. The employees who traditionally have received the protections of the ADEA are older white males. In shifting the RIF to reduce the impact on workers

> protected by the ADEA, the RIF is likely to fall more harshly upon workers who have entered the workforce within the last twenty years. Among the fastest growing groups entering the workforce over the last few years are women and minorities. Women and minorities have always been protected by Title VII and continue to have a disparate impact cause of action available in their legal arsenal. Thus, an attempt to redesign a RIF in order to avoid an ADEA disparate impact claim may shift the burden to females and minorities, who then may have a legal cause for a Title VII disparate impact claim. This is consistent with the fact that the group provided the greatest protection by the ADEA is Caucasian, white-collar males. Once again, the employer is forced to defend its actions in court.

Kelli A. Webb, *Learning How to Stand On Its Own: Will the Supreme Court's Attempt to Distinguish the ADEA from Title VII Save Employers from Increased Litigation?*, 66 Ohio St. L.J. 1375, 1407-08 (2005).

As this Court recognized in *City of Jackson*,

> Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment . . . Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite

> their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

City of Jackson, 544 U.S. at 240-41. As such, the existence of statistical disparities as to age should be treated in a manner consistent with the Congressional recognition that a lower threshold is applicable to an employer's justification of its non-discriminatory actions than that which is applicable in Title VII cases.

The risk of litigation involving disparate impact claims that are based upon statistical evidence which may have little probative value is of great concern to employers, and the likelihood that a personnel action will reflect a disparate impact associated with age is increasing. The Department of Labor's Bureau of Labor Statistics (BLS) forecast a 10 percent overall increase in the civilian labor force between 2004 and 2014, but during the same period of time, the BLS predicts that the number of workers aged fifty-five and older will increase by over 49% – almost five times the overall growth rate. Mitra Toossi, *Labor Force Projections to 2014: Retiring Boomers*, Monthly Lab. Rev., Nov. 2005, at 25, 26 tbl. 1.1, *cited in* Aida M. Alaka, *Corporate Reorganizations, Job*

Layoffs and Age Discrimination, 70 Alb. L. Rev. 143 (2006). Furthermore, BLS estimates that by 2012, workers under the age of forty will comprise only 46.8% of the civilian labor force. Mitra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, Monthly Lab. Rev., Feb. 2004, at 37, 55 tbl. 8., *cited in* Alaka, *supra*, at 143.

If this Court should accept the Petitioner's suggestion that the burden of proof should be placed upon the defendant employer in such cases, after nothing more than statistical evidence of a disparate impact and identification of the specific practice challenged, then almost certainly it will be the rare case indeed that can be judicially concluded short of trial. In discussing summary judgment motions, one court noted,

> The showing by the moving party raising an affirmative defense must be strong indeed: When the movant is seeking summary judgment on the basis of an affirmative defense to which the movant bears the ultimate burden of proof at trial . . . the movant must establish the absence of a genuine issue of material fact as to every element of the affirmative defense. In other words, the movant must establish the affirmative defense as a matter of law such that no reasonable jury could enter a verdict for the nonmovant . . . If the movant satisfies this onerous burden, the burden shifts to the nonmovant to create a genuine issue of material fact as to any element essential to the affirmative defense . . . In cases where the defendant is the moving party, his task does

> not change even if he raises an affirmative defense on which he has the burden of persuasion. He must incontrovertibly prove his affirmative defense, because his goal is to take the case away from the jury. If the plaintiff shows any genuine issue of material fact (as to the affirmative defense or otherwise), the defendant loses the motion.

Anderson v. Deluxe Homes of Pa., Inc., 131 F. Supp. 2d 637, 649 (M.D. Pa. 2001). *See also Madden v. Chattanooga City Wide Serv. Dept., No. 1:06-CV-213*, 2007 U.S. Dist. LEXIS 78998, *14 n.2 (E.D. Tenn. 2007) ("It is difficult for a Court to ever grant summary judgment on an affirmative defense raised by the party carrying the burden of proof.").

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and [Rule 56] should be interpreted in a way that allows it to accomplish this purpose." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). As another court explained,

> [I]f the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor.
>
> If the movant, however, does not bear the burden of proof, he should be able to obtain summary judgment simply by disproving the existence of any essential element of

> the opposing party's claim or affirmative defense. . . . The crucial question for the court is whether there is a "genuine issue" of fact concerning any essential element of the claim on which judgment is being sought. If the moving party can show that there is no evidence whatever to establish one or more essential elements of a claim on which the opposing party has the burden of proof, trial would be a bootless exercise, fated for an inevitable result but at continued expense for the parties, the preemption of a trial date that might have been used for other litigants waiting impatiently in the judicial queue, and a burden on the court and the taxpayers.

Fontenot v. The Upjohn Co., 780 F.2d 1190, 1194-95 (5th Cir. 1986).

The Committee respectfully urges the affirmance of the judgment below, and adoption of the formulation utilized by the Second Circuit, placing the burden of proof as to the reasonableness of the employer's action upon the plaintiff. If the Court were to adopt the formulations advocated by the Petitioners or the government, the opportunity for a court to dispose of unsupported cases through the use of the summary judgment process would be severely curtailed in ADEA cases burdening the courts with unnecessary trials and burdening the litigants with the unwarranted disruption, expense and uncertainty associated with litigation. In an effort to reduce the risk of litigation, it is likely that the resultant statistical analyses, rather than the reasonable factors

other than age, will contribute to age-driven, rather than age-neutral, personnel actions, creating indirect age discrimination from a statute designed to prohibit such conduct.

Although addressing a case which arose in the context of a "reverse discrimination" claim brought under Title VII (unlike the ADEA case presented here) a member of this Court recognized a comparable opportunity for lamentable, unintended consequences, when he wrote the following:

> This Court's prior interpretations of Title VII, especially the decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer's work force. Even the employer who is confident of ultimately prevailing in such a suit must contemplate the expense and adverse publicity of a trial, because the extent of the imbalance, and the "job relatedness" of his selection criteria, are questions of fact to be explored through rebuttal and counterrebuttal of a "prima facie case" consisting of no more than the showing that the employer's selection process "selects those from the protected class at a 'significantly' lesser rate than their counterparts." B. Schlei & P. Grossman, *Employment Discrimination Law* 91 (2d ed. 1983). . . . Thus, after today's decision, the *failure* to [take action in response to statistical disparities may be] economic folly, and arguably a breach of duty to shareholders or

> taxpayers [because of the cost of litigation.] . . . A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.

Johnson v. Transp. Agency, Santa Clara Co., 480 U.S. 616, 676-77 (1987) (Scalia, J., dissenting).

To the extent that scant statistical evidence of a disparate impact associated with age can create the substantial risk of disparate impact discrimination claims based upon age, and particularly litigation which will be exceedingly difficult to dispose of through summary judgment proceedings (as will be the case if the Petitioners' view is adopted), then employers are likely to find themselves facing the same dilemma as that described in Justice Scalia's dissent in *Johnson*.

To borrow the language of one commentator, "[S]tatistics inherently are an unhelpful or misleading gauge of a selection process [and] the statistical 'tail' cannot, and should not, wag the 'dog' that is the selection process itself. King, *supra*, at 81. The Committee urges the Court to affirm the judgment below, and adopt the view expressed by the Second Circuit, when it concluded that "The best reading of the text of the ADEA – in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable."

CONCLUSION

For the reasons set forth above, and the arguments advanced by the Respondents, The Employment and Labor Law Committee of The Association of Corporate Counsel, as *amicus curiae*, respectfully urges the Court to affirm the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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No. 06-1505 4-11-08

IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM, *et al.*,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council, the National Federation of Independent Business, and the Society for Human Resource Management respectfully submit this brief as *amici curiae*. The brief supports the position of Respondents before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) is the nation's leading small-business advocacy association, with offices in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB frequently files *amicus* briefs in cases that will impact small businesses nationwide.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 225,000 individual members, SHRM's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources avail-

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to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

able. As an influential voice, SHRM's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in over 100 countries.

Amici's members are employers or representatives of employers that are subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other federal employment-related laws and regulations. As potential defendants to claims under these laws, *amici's* members have a direct and ongoing interest in the question before the Court regarding which party bears the burden of proof as to whether an employment decision that has adverse impact against older workers is justified by "reasonable factors other than age." Relying on this Court's decision in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), the Second Circuit ruled correctly that in a disparate impact action brought under the ADEA, the defendant employer need only produce a legitimate business justification for the employment practice that has caused the disparity. Once it has done so, the plaintiff bears the burden of proving the justification is unreasonable. Pet. App. 11a-19a.

Because of their interest in matters of this nature, EEAC, NFIB and/or SHRM have filed *amicus curiae* briefs in a number of cases before this Court involving the application and scope of the ADEA, including *Sprint/United Management Corp. v. Mendelsohn*, __ U.S. __, 128 S. Ct. 1140 (2008); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004); *Adams v. Florida Power Corp.*, 535 U.S. 228

(2002); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Wards Cove Packing Co. v. Atonio*, 493 U.S. 802 (1989); *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), and *Shell Oil v. Dartt*, 434 U.S. 98 (1977). Given their significant experience, *amici* are well-situated to brief the Court on the practical, business ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Knolls Atomic Power Laboratory ("KAPL" or the "Laboratory") manages and operates a government-owned nuclear research and development facility under a contract with the Department of Energy (DOE). Pet. App. 37a. It is funded jointly by the DOE and the U.S. Navy's Nuclear Propulsion Program. *Id.* at 5a.

In 1996, as a result of a reduction by the government of its annual staffing level, KAPL was forced to eliminate 108 positions. *Id.* at 38a. At the same time, however, it was required to hire thirty-five new employees needed to perform additional government work involving highly specialized skills it determined were lacking among existing employees. Brief of Respondent at 3. In all, the Laboratory was forced to eliminate a total of 143 existing positions in order to hire thirty-five new staff members while remaining within the government-prescribed staffing limit. Pet. App. 38a. To that end, KAPL offered employees with at least twenty years of service the opportunity to participate in a voluntary severance incentive program, which ultimately resulted in an overall net reduction of 107 positions. *Id.* at 39a. The remaining job cuts were made pursuant to an involuntary reduction-in-force (RIF). *Id.* at 39a-40a.

The selection criteria utilized in the RIF were reviewed and approved by the Department of Energy, Brief of Respondent at 3, and the process was analyzed by KAPL's General Manager and its general counsel to ensure it was fair and appropriate. Pet. App. 6a. In addition, a Review Board independently assessed each manager's selection decisions "to assure adherence to downsizing principles as well as minimal impact on the business and employees." *Id.* In all, thirty-one out of 245 employees were selected for layoff, thirty of whom were over age forty. Brief of Respondents at 11.

Twenty-eight of the terminated employees filed an action in the United States District Court for the Northern District of New York, accusing KAPL, its general manager John Freeh, and its parent corporation Lockheed Martin of both disparate treatment and disparate impact discrimination in violation of the ADEA. *Id.*; Pet. App. 75a. The case was tried to a jury, which returned a verdict for the defendants on the disparate treatment allegations and for the plaintiffs on the disparate impact claims. Pet. App. 75a-76a.

The defendants appealed to the Second Circuit, which affirmed liability on the disparate impact claims, and subsequently the defendants petitioned for a writ of certiorari. Pet. App. 4a. Shortly thereafter, the Court ruled in *Smith v. City of Jackson* that while disparate impact causes of action are available under the ADEA, Title VII's business necessity test is inapplicable in the age discrimination context. Pet. App. 5a. Based on its decision in *Smith*, the Court granted the defendants' petition, vacated the Second Circuit's ruling, and remanded the case for further proceedings. *Id.*

On remand, the Second Circuit in a 2-1 decision ruled for the defendants. The panel majority concluded that once the plaintiffs in an ADEA disparate impact claim have identified a specific practice responsible for the disparity, the employer need only produce a legitimate business justification for that practice. Pet. App. 11a-21a. It therefore vacated the judgment of the district court, and remanded the case for an entry of judgment in favor of the defendants. *Id.* at 21a.

The plaintiffs petitioned for a writ of certiorari, which this Court granted on January 18, 2008.

SUMMARY OF ARGUMENT

The panel majority below ruled properly that in order to prevail on a claim of disparate impact discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, stemming from the application of a facially neutral employment practice, a plaintiff must prove the challenged practice is unreasonable. As this Court made clear in *Smith v. City of Jackson*, ADEA disparate impact actions are to be narrowly construed.

The question of who bears the burden of demonstrating an employment practice is unreasonable under the ADEA is of great importance to corporate America, which is committed to ensuring the highest standards of quality and, to that end, regularly reexamines the manner in which it conducts business. These companies rarely approach difficult decisions to restructure their businesses or to eliminate personnel without having carefully analyzed the issues and taken steps to minimize any negative consequences to their employees or the larger community. Especially in the case of reductions-in-force necessitated

by circumstances beyond an individual employer's control, these legitimate business decisions should be presumed valid, unless proven by the plaintiff challenging them to be unreasonable.

The combination of deteriorating economic conditions and an aging workforce could lead to a period of time during which older workers as a group are disproportionately impacted by layoffs, through no improper intent on their employers' part. Requiring employers to defend the reasonableness of their legitimate business decisions will encourage any older worker affected by a reduction-in-force or corporate restructuring to pursue ADEA disparate impact litigation, most likely on a collective basis, the costs and negative publicity of which could have a devastating impact on both large and small employers.

ARGUMENT

I. REQUIRING EMPLOYERS WHO ALREADY HAVE DEMONSTRATED A LEGITIMATE BUSINESS JUSTIFICATION TO ALSO PROVE THE REASONABLENESS OF THEIR WORKFORCE REDUCTION AND CORPORATE RESTRUCTURING DECISIONS WILL SIGNIFICANTLY AFFECT THEIR ABILITY TO COMPETE IN TODAY'S FAST-PACED BUSINESS ENVIRONMENT

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a). Section 623(f)(1) of the ADEA further provides, however, that "[i]t shall not be unlawful for

an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . ." 29 U.S.C. § 623(f)(1).

In *Smith v. City of Jackson, Miss.*, this Court held that disparate impact causes of action are available under the ADEA, but that employment actions resulting in age disparities will not be unlawful if based on "reasonable factors other than age." 544 U.S. 228, 240-41 (2005). While the Court in *Smith* did not address directly the parties' respective burdens of proof and persuasion in an ADEA disparate impact case, as Respondents' brief points out, given the important textual and practical differences between the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, the Second Circuit logically concluded based on *Smith* that plaintiffs in an ADEA disparate impact case bear the burden of proving a challenged employment practice is unreasonable and thus unlawful under the Act. Pet. App. 11a-19a.

The question of who bears the burden of demonstrating an employment practice is reasonable or unreasonable under the ADEA has significant implications for the business community. As U.S. companies continue to face economic challenges and global competition, they are compelled to consistently reexamine their business models and strategies in order to remain competitive. Such reexaminations often result in workforce changes that are fully justified by legitimate business needs.

Companies rarely approach the difficult decisions to restructure their businesses or to eliminate personnel without having carefully analyzed the issues and taken steps to minimize any negative consequences to their employees or their communities. Es-

pecially in the case of reductions-in-force necessitated by circumstances beyond an individual employer's control, these legitimate business decisions should be presumed valid, unless proven by the plaintiff to be unreasonable.

This is particularly true in the context of decisions having an adverse impact on older workers. As this Court observed both in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993) and more recently in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), age often is correlated to legitimate criteria routinely used by employers as a means of differentiating among employees. Ordinary aging and career advancement patterns tend to result in older workers as a group holding higher-level, better-paid, and longer-established positions of employment than their younger counterparts. Career longevity also naturally leads to a differentiation between older and younger workers with respect to the level of skills, experience, and ability they bring to the job.

Because of these natural correlations, many business decisions and practices, even though age-neutral in intent, tend to impact older workers differently than younger ones. Some of these decisions and practices work to the older workers' advantage; others tend to benefit younger workers. Examples of the latter could include workforce reductions designed to cut salary and benefit costs; business restructurings designed to make organizations less top-heavy; plant-closings and relocations of operations accompanied by significant personnel turnover; changes in product lines, technologies and methods of operation that require workers with new or different skills; and salary adjustments designed to improve hiring and

retention of employees in entry-level and relatively low-level positions.

When an employment practice is challenged as having an adverse impact on older workers under the ADEA, the employer must produce evidence, under *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), that the practice is based on non-age factors. Once it has done so, logic dictates that the employee challenging the employment practice then must prove the practice is unreasonable. Placing upon the employer the burden of showing "reasonableness" is akin to obligating it, in a disparate treatment case, to show its legitimate, nondiscriminatory justification for an employment action is not a pretext for unlawful discrimination. Of course, the law imposes no such obligation, as doing so would relieve the plaintiff of the ultimate burden of proving discrimination.

Shifting the burden of proving reasonableness to the employer, rather than placing on the employee the burden of proving unreasonableness, thus would lead to incongruous results that are inconsistent with established principles of law. It also would lead to considerable confusion among employers as to what additional evidence they must offer to prove a challenged employment practice is reasonable, despite already having articulated a legitimate justification.

KAPL was required, as a result of the government's action in reducing its staffing level for 1996, to eliminate over 100 positions. In order to service new government programs requiring cutting-edge technologies, however, KAPL determined that its current workforce did not possess the requisite specialized skills and thus would need to be supplemented with additional personnel. Brief of Respondent at 3. Had

it not done so, KAPL would not have been in a position to perform the work as well or as quickly, which might have jeopardized its ability to secure similarly-advanced work in the future.

The approach KAPL took in making the tough business decisions it faced was eminently reasonable. Not only did the Laboratory turn to the Department of Energy for guidance, but it also studied and applied industry best practice in developing its strategy for effectuating the necessary job cuts. Brief of Respondent at 4. It provided written guidance and training to managers responsible for making individual termination decisions and subjected those determinations to additional scrutiny by a Review Board. In short, KAPL took the steps necessary to ensure that its RIF decision rested on legitimate business factors other than age.

Requiring KAPL or any other employer to prove that its non-age based business justification for a resulting disparity is reasonable, rather than to require the plaintiff to prove the stated reason is unreasonable, would impose an additional burden that is inconsistent with the purpose and intent of the ADEA. It also would place companies at a competitive disadvantage in an ever-increasingly global business environment, especially in times of economic decline and uncertainty, where they regularly are faced with making tough business decisions in order to remain viable.

II. RELIEVING PLAINTIFFS OF THE BURDEN OF PROVING THAT A CHALLENGED EMPLOYMENT PRACTICE IS UNREASONABLE WILL ENCOURAGE ADEA DISPARATE IMPACT LITIGATION

In addition, relieving employees challenging the legality of an employment practice that has an disparate impact on older workers of the burden of proving the employer's stated justification is unreasonable likely would lead to a substantial increase in ADEA disparate impact class-based litigation, at least some of which would be intended solely to pressure businesses to settle out of court.

The ADEA incorporates the enforcement scheme of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, which permits "any one or more employees for and in behalf of himself or themselves and other employees similarly situated" to file suit to recover damages for an alleged violation of the Act. 29 U.S.C. § 216(b). A plaintiff asserting class-based claims under the ADEA is not required to satisfy the threshold requirements of Rule 23 of the Federal Rules of Civil Procedure, and will be permitted to bring a "collective" action on behalf of all employees "similarly situated." *See, e.g., Ruehl v. Viacom, Inc.*, 500 F.3d 375, 379 (3d Cir. 2007).

Given these less rigorous procedural requirements, at the moment such an action is filed, ADEA plaintiffs gain a tactical advantage over employers who invariably will face substantial defense costs and potentially damaging publicity as a result of the mere allegation of discrimination. Requiring plaintiffs to prove that an employment practice having adverse impact on older workers is unreasonable would discourage the use of the ADEA collective action proce-

dure as a tactic for negotiating large settlements and would minimize the filing of frivolous lawsuits.[2]

In 2008, the Administration on Aging published 2006 statistics on older Americans, which showed, among other things, that the population of persons age 65 and older living in the U.S. increased nearly 10% since 1996 to 37.3 million people, who "represented 12.4% of the U.S. population, about one in every eight Americans." Administration on Aging, U.S. Dep't of Health & Human Servs., *Statistics, A Profile of Older Americans: 2007* (Feb. 11, 2008).[3]

Experts expect this number to continue to increase, with the U.S. Bureau of the Census estimating a total population of 40 million older persons in 2010 and nearly 55 million in 2020.[4] In addition, a

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[2] Despite Petitioners' assertions to the contrary, placing the burden on plaintiffs in an ADEA disparate impact case to plead and ultimately prove that the challenged employment action is unreasonable would not require "second sight" on their part. *See* Brief *Amici Curiae* AARP, *et al.*, at 21. In *Bell Atlantic Corp. v. Twombly*, this Court said, "we do not require heightened fact pleadings of specifics, but only enough facts to state a claim to relief that is plausible on its face." 127 S. Ct. 1955, 1974 (2005). It ruled that factual allegations contained in a civil complaint "must be enough to raise a right to relief above the speculative level" in order to survive a motion to dismiss. *Id.* at 1965. Never has it been suggested that the plaintiffs' burden ultimately to prove unreasonableness in the ADEA disparate impact context would, or could, arise unless and until the employer articulated a legitimate business justification for the challenged practice.

[3] *Available at* http://www.aoa.gov/PROF/Statistics/profile/2007/3.asp.

[4] *See* Administration on Aging, U.S. Dep't of Health & Human Servs., *Table, Older Population by Age: 1900 to 2050* (June 23, 2005), *available at* http://www.aoa.gov/prof/Statistics/online_stat_data/AgePop2050.asp.

January 2008 U.S. Bureau of Labor Statistics report suggests that older workers are remaining on the job longer than in previous years. *See generally* Murray Gendell, *Older Workers: Increasing Their Labor Force Participation and Hours of Work*, 131 Monthly Lab. Rev. 41-54 (Jan. 2008).

As the U.S. workforce continues to age, and a declining economy forces more employers to undergo layoffs and restructurings, it is inevitable that older workers will be impacted. It also is likely that the number of ADEA collective actions will increase. Placing the burden on employers of proving their corporate layoff decisions were based on "reasonable factors other than age"—instead of more logically on the employee or employees challenging the practice as discriminatory and thus *per se* unreasonable—will encourage even more ADEA disparate impact litigation.

And the increase in ADEA disparate impact litigation, which in most cases likely will proceed on a collective basis, invariably will lead to the "blackmail value" discussed in the Title VII class action context "that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000). Indeed, companies facing substantial defense costs and potential class-based liability for ADEA disparate impact discrimination "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995) (citations omitted).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

CLIFFORD B. MEACHAM, ET AL.,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GENERAL ELECTRIC CO. SUPPORTING RESPONDENTS

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GENERAL ELECTRIC CO. SUPPORTING RESPONDENTS

Amicus curiae General Electric Co. ("GE"), by its undersigned counsel, respectfully submits this brief in support of respondents Knolls Atomic Power Laboratory ("KAPL"), *et al.*, and in support of affirming the decision of the court of appeals, *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134 (2d Cir. 2007) ("*Meacham II*") (Pet. App. 1a-32a).[1]

[1] Counsel for both parties have consented to the filing of *amicus* briefs. Their consents have been filed with the Clerk of this Court. In compliance with Rule 37.6 of this Court, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no party or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae General Electric is one of the largest and most diversified corporations in the world. Since its incorporation in 1892, GE has developed a wide variety of products across a diverse spectrum of business enterprises. GE's various business units provide a broad array of goods and services throughout the United States and the world. Doing business through numerous consolidated operating divisions, GE's products and services include aircraft engines, appliances, capital services, industrial systems, lighting, medical systems, the NBC television network, power systems, and transportation systems. GE's diverse business interests often lie in dynamic and cutting-edge industries. For instance, GE previously owned Knolls Atomic Power Laboratory, before divesting its interest to Martin Marietta Corp. in the early 1990s.

Across these various business enterprises, GE currently employs thousands of persons in the United States, and thousands more around the world. GE makes countless employment decisions that potentially are subject to the requirements of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621 *et seq.* (2007). Accordingly, GE has a vital interest in the proper application of the ADEA.

GE also has a direct interest in the proper disposition of the issue raised in this case. GE and its operating divisions use an employee-ranking matrix that incorporates elements similar to those used by KAPL, including reliance on managerial assessments and the criticality and flexibility factors

specifically challenged by petitioners here.[3] Because of the diversity of its business activities, GE has broad experience bearing on the importance of permitting employers, in making difficult employment decisions, to rely on managerial discretion, to consider the criticality of an employee's skills, and to evaluate an employee's flexibility adapting to new requirements and competitive demands.

Unless the judgment of the court of appeals is sustained, GE—along with numerous other companies, both large and small—will be obliged, unnecessarily, to revisit its personnel policies and to consider the adoption of alternative measures that limit managerial discretion and minimize allegedly subjective elements, even though the criteria currently used by GE are plainly based on legitimate and sound business needs. Such an outcome will adversely affect the business interests of GE and other employers, and ultimately will make it significantly more difficult for employers to remain competitive in global markets.

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[3] *See, e.g., Hatcher v. General Electric*, No. 98-6304, 2000 U.S. App. LEXIS 2837, at *3-4 (6th Cir. Feb. 22, 2000) ("GE used a RIF matrix to rank those in the same job classification to determine who should be eliminated in RIF."); *Lenhart v. General Electric Co.*, 140 F. Supp. 2d 582, 586 (W.D.N.C. 2001) ("GEL [General Electric Lighting, an unincorporated operating division of GE,] uses an established set of written guidelines, including the RIF Identification Matrix, to rank salaried employees for layoffs. The supervisor . . . ranks employees in four categories, which are defined in the RIF Guidelines: Historical Performance, Flexibility, Criticality of Skills, and Company Service. The RIF guidelines provide that rankings are to 'be principally based' on the employee's performance over the previous 12 to 24 months.").

SUMMARY OF ARGUMENT

In pertinent part, the ADEA provides that "it shall not be unlawful for an employer . . . to take any action otherwise prohibited under . . . this section . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) ("RFOA provision"). Contrary to petitioners' suggestion, construing this provision as an affirmative defense, and thus placing on employers the burden of proving the reasonableness of all manner of personnel decisions, is inconsistent with the Court's decisions interpreting the ADEA and Title VII. The Court's pre-1991 interpretation of the allocation of burdens under Title VII unequivocally placed the ultimate burden of persuasion on the plaintiff-employee in disparate-impact claims, and allocated only a burden of production to defendant-employers. That allocation of burdens remains applicable under the ADEA. Petitioners' attempt to reallocate the burden of proof on the issue of reasonableness to the defendant-employer is inconsistent with the Court's pre-1991 Title VII decisions, and contrary to the Court's holding in *City of Jackson*. Contrary to petitioners' suggestion, there also is no basis—statutory or otherwise—for construing the RFOA provision as an affirmative defense.

Petitioners' suggested allocation of burdens also fails to strike an appropriate balance between the needs of employers and the underlying objectives of the ADEA. Under the ADEA, private employers are entitled to exercise discretion in designing and implementing personnel policies, so long as those policies do not discriminate based on age. An employer's ability to exercise sound business judgment in making such employment decisions is critical to the

productivity, quality, and ultimate success of any business. Forcing employers to demonstrate and prove the reasonableness of their employment decisions not only is contrary to controlling precedent and unsupported by statute, but also would impose unwarranted and unduly onerous burdens on employers. As a result, petitioners' suggested reallocation of burdens would constrain countless employers from exercising their sound discretion in hiring or promoting employees based on the employers' business judgment relating to quality, productivity, and similar criteria. Instead, the risk of liability under the ADEA would create a formidable incentive for employers to adopt more generic personnel policies that, although more easily defensible, do not promote sound business objectives as efficiently.

This Court has been very clear in ruling that an employer has the right to use its discretion in choosing among equally qualified candidates, provided that the choice is not based on discriminatory criteria. Equally well-established is the principle that the ultimate burden of persuasion in disparate-impact cases should remain with the plaintiff. Petitioners' attempt to shift that burden, and thereby restrict an employer's legitimate interest in relying on managerial discretion in employment decisions, is both unsupported by law and unduly burdensome.

ARGUMENT

I. IMPOSING ON EMPLOYERS THE BURDEN OF PROVING THE REASONABLENESS OF EMPLOYMENT DECISIONS BASED ON FACTORS OTHER THAN AGE IS UNSUPPORTED BY STATUTE AND CONTRARY TO THE HOLDINGS OF THIS COURT.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005) ("*City of Jackson*"), the Court held that a disparate-impact theory of recovery is available to workers suing their employers under the ADEA. Under that theory, plaintiffs may challenge an employer's facially-neutral employment practices without having to prove that the employment practice was motivated by an intent to discriminate, so long as the plaintiffs can demonstrate that the challenged employment decisions have a disproportionately adverse impact on employees over the age of forty. *Id.* at 243. *City of Jackson* thus extended the holding of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held that Title VII incorporates a disparate-impact theory, to claims arising under the ADEA.[3]

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[3] The Court's decision in *Griggs* was based, in part, on the conclusion that Congress enacted Title VII "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. Petitioners overlook this critical fact in suggesting that the Court's later expansion of *Griggs* "to an employer's 'system of subjective decisionmaking,'" Pet. Br. 3 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1989)), suggests that all employment decisions that incorporate subjective elements are suspect. Because there is no similar history of discrimination against older workers, *see City of Jackson*, 544 U.S. at 240, there is no basis for presuming that managerial discretion or

The Court's holding in *City of Jackson* was not limited to the conclusion that the ADEA can support a disparate-impact theory. The Court also held that its "pre-1991 interpretation" of Title VII "remains applicable to the ADEA," and that the 1991 amendments to Title VII, which "*expanded* the coverage" of that statute, do not apply in the context of ADEA claims. 544 U.S. at 240 (emphasis added). As demonstrated below, the Court's pre-1991 interpretation of the allocation of burdens under Title VII unequivocally placed the ultimate burden of persuasion on the plaintiff-employee in disparate-impact claims, and allocated only a burden of production to defendant-employers. That allocation of burdens remains applicable under the ADEA. Petitioners' attempt to reallocate the burden of proof on the issue of reasonableness to the defendant-employer is inconsistent with the Court's pre-1991 Title VII decisions, and thus contrary to the Court's holding in *City of Jackson*. The reallocation of burdens urged by petitioners also is inconsistent with the Court's conclusion that the relief available under the ADEA is significantly narrower than that provided under Title VII.

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subjective employment factors that correlate with age function as a vehicle or proxy for latent, persistent discrimination. Indeed, mindful of the potential difficulties employers might face in justifying employment practices that include subjective or discretionary elements, the Court in *Watson* emphasized that "courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." 487 U.S. at 999 (quoting *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

A. The Court's Pre-1991 Decisions Unequivocally Place the Ultimate Burden of Persuasion on the Plaintiff.

The Court's pre-1991 decisions regarding the allocation of burdens in disparate-impact claims arising under Title VII place the ultimate burden of persuasion on the plaintiff, and hold that defendant bears *only* the burden of production. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-59 (1989).

After ruling in *Griggs* that Title VII can support a disparate-impact theory of recovery, the Court clarified the scope of the disparate-impact theory and the requirements for a successful claim in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). Spelling out the applicable evidentiary standards, the Court held that plaintiffs alleging that an employer's facially-neutral employment practices had an adverse impact on a Title VII-protected class initially must (1) identify "the specific employment practice that is challenged"; (2) present statistical evidence of the disparity complained of; and (3) prove causation. *Id.* at 994. Once the plaintiff satisfies its prima facie burden, the Court explained that, to rebut plaintiff's showing, the defendant must offer evidence that the challenged practice is job-related or justified by business necessity. *Id.* at 997-98. As in disparate-treatment cases, the defendant in a disparate-impact case prior to 1991 was required merely to "articulate some legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See also Keene State College v. Sweeney*, 439 U.S. 24, 24-25 (1978) (holding that employer need not "prove absence of discriminatory motive" to counter employee's claim); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978)

(explaining that defendant does not bear burden of proving that hiring procedure maximizes consideration of minority applicants). The defendant's burden thus is one of production, not of proof.

If the employer meets its burden of production, the inference of discrimination raised by the plaintiff's prima facie showing of an adverse impact is rebutted and thus "drops from the case." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). Under the Court's pre-1991 case law, the plaintiff then must shoulder the burden to demonstrate that alternative policies or practices exist that would meet the employer's legitimate business goals without causing the disparate impact. *Watson*, 487 U.S. at 998. Under this now-familiar "burden-shifting" framework, although the plaintiff's prima facie showing shifts the burden of production to the defendant, the "*ultimate burden* of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.* at 997 (emphasis added). Thus, as in the disparate-treatment context, "the *ultimate burden* of persuading the trier of fact . . . remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253 (emphasis added). *See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-11 (1993). The plaintiff thus continues to bear the burden of proving that relief under the statute is warranted.

One year after *Watson*, in *Wards Cove Packing Co. v. Atonio*, the Court again emphasized that plaintiffs asserting a disparate-impact claim under Title VII bear the "'ultimate burden'" of proof. 490 U.S. at 659 (quoting *Watson*, 487 U.S. at 997). In reaching that conclusion, the Court stressed that plaintiffs may not

prevail merely by pointing to the existence of a racial imbalance in the workforce. Rather, a plaintiff "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." 490 U.S. at 657. As the Court reasoned, "to hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'" *Id.* (quoting *Watson*, 487 U.S. at 992). After *Watson* and *Wards Cove*, there can be no serious dispute that the Court's pre-1991 decisions interpreting Title VII allocated the burden of persuasion to the plaintiff, and placed only the burden of production on the defendant.

B. The Court's Pre-1991 Allocation of the Ultimate Burden of Persuasion Remains Applicable to Disparate-Impact Claims Arising under the ADEA.

As the Court emphasized in *Wards Cove*, the "'ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.'" 490 U.S. at 659 (quoting *Watson*, 487 U.S. at 997). This pre-1991 allocation of burdens for disparate-impact claims arising under Title VII applies to claims arising under the ADEA. *See, e.g.*, *Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979) (applying Title VII burden allocation to ADEA claim where employer terminated employee based on a reasonable factor other than age, and concluding that plaintiff bears "the ultimate burden of establishing his or her case of discrimination by a preponderance of the evidence"); *Barnhart v. Pickrel, Schaeffer, Ebeling Co.*, 12 F.3d 1382, 1390 (6th Cir.

1993) ("The plaintiff retains the ultimate burden of persuasion in an employment discrimination case.").[4]

This same allocation of burdens controls for disparate-impact claims asserted under the ADEA. As in the case of an employer rebutting a plaintiff's prima facie disparate-impact claim under Title VII prior to 1991, it is enough that the employer "articulate" a legitimate, non-discriminatory business reason for the challenged employment decision or practice. *McDonnell Douglas*, 411 U.S. at 802. The defendant does not thereby assume the burden of proof. Applying the Court's holdings in *Watson* and *Wards Cove* regarding the allocation of burdens under the third prong of the Title VII inquiry, it is the plaintiff that bears the burden to rebut the reasonableness of the factor (or set of factors) identified by the defendant as the basis for its employment decision. This is the only plausible allocation that imposes on plaintiffs the "ultimate burden of persuasion" in making a claim for adverse impact.

The Court's decisions consistently have recognized that the ADEA was patterned after Title VII, and (at least prior to the amendment of Title VII in 1991) the Court has adopted parallel constructions of the burdens in cases arising under the two statutes. As the Court has observed, Congress relied heavily on the language and scope of Title VII in drafting the ADEA. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 584

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[4] Although *Barnhart* involves a disparate-treatment claim, there is no basis for distinguishing the plaintiff's ultimate burden in the two contexts. *See Watson*, 487 U.S. at 987 ("The distinguishing features of the factual issues that typically dominate in disparate-impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used.").

(1978) ("there are important similarities between [Title VII and the ADEA] . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII"). The Court has ruled that, because Congress intended the two statutes to have "similar purposes," it is "appropriate to presume that Congress intended that text to have the same meaning in both statutes." *City of Jackson*, 544 U.S. at 233.

The Court's decision in *City of Jackson* strongly suggests that the Court's pre-1991 allocation of burdens under Title VII remains applicable in the context of disparate-impact claims brought under the ADEA.[5] For instance, in considering whether plaintiffs satisfied their prima facie burden, the Court concluded that "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." 544 U.S. at 241. In reaching that conclusion, the Court expressly applied the *Wards Cove* requirement that the plaintiff is required to "'isolate[] and identify[] the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'" *Id.* (quoting *Wards Cove*, 490 U.S. at 656) (emphasis in original). Petitioners' argument that the Court's decision in *City of Jackson* does not support allo-

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[5] Justices O'Connor, Kennedy, and Thomas all concluded in *City of Jackson* that the burden formulation set forth in *Wards Cove* and *Watson* controls under the ADEA, and thus "once the employer has *produced* evidence that its action was based on a reasonable nonage factor, *the plaintiff bears the burden of disproving this assertion.*" 544 U.S. at 267 (O'Connor, J., concurring) (citing *Wards Cove*, 490 U.S. at 659-60; *Watson*, 487 U.S. at 997) (emphasis added).

cating the burden of proof to plaintiffs ignores this critical fact. It also leads to the incongruous result that the burden *Wards Cove* places on Title VII plaintiffs in satisfying their prima facie obligations applies under the ADEA, but the *Wards Cove* holding that plaintiffs bear the ultimate burden of persuasion does not. There is no support in the Court's decision in *City of Jackson* or elsewhere for cherry-picking from prior precedent in this manner.

The Court also held in *City of Jackson* that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240. The Court explained that Congress' 1991 amendments "expanding" the scope of relief available under Title VII do not apply to claims arising under the ADEA. *Id.* Contrary to petitioners' suggestion, Pet. Br. 46-49, *City of Jackson* does not support the proposition that the Court intended to apply only those aspects of its pre-1991 Title VII decisions construing "identical language" in Title VII and the ADEA to disparate-impact claims arising under the ADEA. Rather, the point was that the 1991 amendments to Title VII left the ADEA unchanged and thus left the *Wards Cove* allocation of burdens undisturbed with respect to the ADEA.

Petitioners' reading also ignores that the "business necessity" justification applied under Title VII serves a parallel function to the RFOA provision under the ADEA—that is, permitting an employer to contest a plaintiff-employee's prima facie case by identifying legitimate, non-discriminatory business justifications for the practice or policy in question. Indeed, before *City of Jackson*, courts frequently applied Title VII's business-necessity analysis to ADEA disparate-impact claims. *See, e.g., Meacham v. Knolls Atomic*

Power Laboratory, Inc., 381 F.3d 56 (2d Cir. 2004), *vacated*, 544 U.S. 957 (2005) ("*Meacham I*") (Pet. App. 33a-69a). This Court rejected that approach in *City of Jackson*, not because the two inquiries were so dissimilar that a different allocation of burdens was warranted, but because the text of the ADEA required a lower threshold for defendants to rebut a plaintiff's prima facie showing of adverse impact. 544 U.S. at 240-42.

Properly construed, *City of Jackson* ruled that the reasonableness inquiry required under Section 4(f)(1) of the ADEA *replaced* the business-necessity prong of the *Wards Cove* framework. 544 U.S. at 240-42. As the court of appeals here correctly recognized, simply adding the reasonableness inquiry on top of the three-part *Wards Cove* framework is "an unnatural reading of *City of Jackson*" that "would introduce a redundant (and counterintuitive) step in the analysis." *Meacham II*, 461 F.3d at 141 n.5 (Pet. App. 10a n.5). *Wards Cove*'s ruling that defendants must bear only the burden of production thus should apply with equal force to claims arising under the ADEA.

Petitioners' approach also would be inconsistent with the Court's holding in *City of Jackson* that "the scope of disparate-impact liability under ADEA is narrower than under Title VII." 544 U.S. at 240. If petitioners were correct and defendants were required to bear the burden of proof on reasonableness, plaintiffs asserting a disparate-impact claim would need to do no more than satisfy their prima facie obligation to identify specific employment practices that, although facially-neutral and not motivated by discriminatory intent, nonetheless have an adverse impact on workers that correlates with age. Under such an approach, plaintiffs could prevail solely by

meeting their prima facie burden. Such a result would greatly *expand* an employer's potential liability under the ADEA as compared to the pre-1991 Title VII, under which the employee was required to bear the ultimate burden of persuasion. This is especially true because plaintiffs may meet their prima facie burden through the introduction of statistical evidence of an adverse impact.[8] *See Watson*, 487 U.S. at 994 (plaintiff may satisfy prima facie burden by "offer[ing] statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group"). Petitioners' approach is further flawed because it disregards the court of appeals' accurate observation that a plaintiff's prima facie showing "is not itself necessarily probative of whether [a defendant's] business justification for particular features of its IRIF was 'reasonable.'" *Meacham II*, 461 F.3d at 145 (Pet. App. 18a).

Because there is no basis under the ADEA for disregarding the *Wards Cove* allocation of the ultimate burden of persuasion, the Court's decision in *City of Jackson* provides compelling support for applying the *Wards Cove* burden scheme to ADEA claims. Under that scheme, the plaintiff retains at all times the ultimate burden of persuasion.

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[8] Requiring plaintiffs to bear the burden only for this prima facie showing also is contrary to the Court's conclusion in *City of Jackson* that it is error to impose liability where plaintiffs "have done little more than point out that the [employment decision] at issue is relatively less generous to older workers than to younger workers." 544 U.S. at 241.

C. Petitioners' Characterization of the ADEA's "Reasonable Factors Other than Age" Provision as an Affirmative Defense Is Mistaken.

Section 4(f)(1) of the ADEA provides that: "it shall not be unlawful for an employer . . . to take any action otherwise prohibited under . . . this section . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The plain language of the RFOA provision thus indicates that employment decisions that potentially correlate with age differentiation are *not unlawful* if they are based on legitimate, facially-neutral factors other than age.[7] Accordingly, Section 4(f)(1) does not create an affirmative defense, but rather functions as a definitional provision that underscores what "shall not be unlawful" discrimination under Section 4(a). *Id. See Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1988) (RFOA clause is not an affirmative defense; it is a denial of the plaintiff's prima facie case). The ADEA's legislative history confirms this interpretation. *E.g.*, 113 Cong. Rec. 1,377 (1967) (statement of Secretary of Labor that

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[7] The federal government argues that interpretation of the "any other factor other than sex" provision of the Equal Pay Act, 29 U.S.C. § 206(d)(1)(iv), as an affirmative defense should support a similar reading of the ADEA's RFOA provision. This argument, however, ignores the fact that the Court already has concluded in *Co. of Washington, Oregon v. Gunther*, 452 U.S. 161 (1981), that the "any other factor other than sex" provision was intended to confine the Equal Pay Act to wage differentials attributable to sex discrimination, and thus to preclude disparate-impact claims under the statute. *Id.* at 169-71. It would be odd indeed if the provision of the Equal Pay Act that *precluded* disparate-impact claims was read to *broaden* such claims under the ADEA.

"[r]easonable differentiations not based solely on age . . . would not fall within the proscription").

City of Jackson supports this reading. In considering the function of the RFOA provision, the Court rejected the notion that it operates as "a safe harbor from liability." 544 U.S. at 238 (internal quotations and citations omitted). Instead, the Court concluded that "the RFOA plays its principal role by *precluding* liability if the adverse impact was attributable to a non-age factor that was 'reasonable.'" *Id.* at 239 (emphasis added). Construing the RFOA provision as an affirmative defense cannot be reconciled with this prior interpretation. *Id.* at 238 ("if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place"). *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.").

Contrary to petitioners' suggestion, there is no justification for construing the RFOA provision as an affirmative defense on the theory that employers "are better positioned to defend the reasonableness of their practices, having better access to the information that is most likely to be relevant to the jury's deliberation." Pet. Br. 19. Petitioners' reasoning is mistaken. Given modern discovery procedures, plaintiffs are equally able to offer proof as to the alleged unreasonableness of the challenged practice as employers are to defend it. More fundamentally, petitioners disregard the fact that the RFOA provision permits practices that are "reasonable," not merely those that are justified by "business necessity." *See City of Jackson*, 544 U.S. at 239-40.

Under this standard, the test for permissibility under the ADEA is whether the factors on which an employer relied are rationally related to a legitimate business goal. The plaintiff can challenge this rational relationship just as easily as the employer can defend it. In fact, placing the burden of proof on the employer invites the trier of fact to second-guess employers' business judgments, something this Court repeatedly has cautioned is not supported by statute and is not a task for which courts are well-suited. *Watson*, 487 U.S. at 999 ("'[C]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.'" (quoting *Furnco Const.*, 438 U.S. at 578)).

II. PETITIONERS' REALLOCATION OF THE BURDEN OF PROOF TO DEFENDANTS PLACES ON EMPLOYERS AN UNWARRANTED AND ONEROUS BURDEN THAT WILL BE DETRIMENTAL TO EMPLOYERS' LEGITIMATE EFFORTS TO MAINTAIN A FLEXIBLE AND COMPETITIVE WORKFORCE.

Private employers—whether they operate large, diversified enterprises or small businesses—are entitled to exercise their own discretion in choosing whom to hire, retain, promote, or fire, so long those decisions are not discriminatory. An employer's ability to exercise its sound business judgment in all manner of employment decisions is critical to the productivity, quality, and ultimate success of any business. The allocation of burdens urged by petitioners threatens that hallmark of American free enterprise. Forcing employers to demonstrate and prove the reasonableness of all manner of employ-

ment decisions not only is contrary to controlling precedent and unsupported by statute, but also would impose unwarranted and unduly onerous burdens on employers. Once an employer satisfies its burden of production by identifying the legitimate, non-discriminatory factors on which it based a challenged personnel decision, no further showing of reasonableness should be required. Although plaintiffs retain the opportunity to rebut the legitimacy of an employers' offered explanation by challenging the reasonableness of that decision, there is no principled basis for placing the burden of proof on employers.

Petitioners claim that the policies employed by KAPL in implementing its reduction in force ("RIF") program produced an adverse impact on older workers. According to petitioners, "the discretionary authority bestowed on lower level managers" and the decision to incorporate allegedly subjective factors such as "flexibility" and "criticality" in the RIF matrix resulted in "startlingly skewed results." Pet. Br. 8, 7. The court of appeals rejected this notion, properly concluding that "[a]ny system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable." *Meacham II*, 461 F.3d at 146 (Pet. App. 19a). Accepting petitioners' suggested reallocation of the burden of proof would threaten the continued ability of employers to rely on managerial assessments and to incorporate such legitimate employment criteria in making employment decisions.

A. The Policies and Employment Criteria Used by KAPL in Making the RIF Decisions Challenged Here Are Plainly Job-Related and Incorporate Elements Commonly Used by Numerous Other Employers.

In implementing the RIF, KAPL required managers and supervisors for each unit to evaluate employees selected for potential termination, ranking them in a "matrix" based on four criteria: (1) performance; (2) flexibility; (3) criticality of the employee's skills; and (4) years of service. *See* JA 94-98. The RIF matrices ranked each employee according to his or her manager's assessment in these categories.

All available evidence supports the court of appeals' conclusion that the particular elements of KAPL's RIF policies challenged by petitioners—that is, the use of the "criticality" and "flexibility" criteria and the resulting reliance on managerial discretion—serve legitimate business goals. According to the record, respondents introduced evidence at trial establishing that these facially-neutral criteria evaluated factors considered essential to KAPL's ability to complete its existing project obligations and to compete for future projects. *Meacham I*, 381 F.3d at 74 (Pet. App. 59a). Specifically, the criticality factor enabled managers to assess an employee's skill level in performing those projects most important for KAPL's present and future success. The factor thus captured an employee's relative value on the job. JA 102-03. The flexibility factor enabled managers to evaluate whether an employee could contribute to multiple projects, or could be retrained to do so. JA 121-27. As respondents argued, and petitioners

failed to rebut, these factors were necessary to determine whether terminating a particular employee would undermine KAPL's ability to complete existing projects or would affect the quality of the work performed in a given unit. The criticality and flexibility factors were especially important given the changing nature of the government's demands on KAPL and the highly technical character of the nuclear-powered propulsion projects assigned to the lab. *Meacham I*, 381 F.3d at 74 (Pet. App. 59a) ("Unchallenged, KAPL's justification would preclude a finding of disparate impact.").

As to KAPL's reliance on the assessments of managers and supervisors, respondents' experts testified that KAPL's RIF policies, including "the subjective components of the IRIF," were "appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Meacham II*, 461 F.3d at 144 (Pet. App. 16a). As the court of appeals concluded, KAPL's RIF policies were designed "to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions," and thus KAPL "advanced a facially legitimate business justification for the IRIF and its constituent parts[.]" *Id.* at 140 (Pet. App. 8a) (citations and quotations omitted).

The policies and criteria selected by KAPL plainly were designed to evaluate critical job-skills and other factors generally considered important in making employee retention decisions. The factors were thus rationally related to KAPL's business needs. Indeed, KAPL is far from the only company that employs such policies or relies on these particular criteria in making personnel decisions. To the contrary, the

record indicates that these factors are common elements in RIF policies throughout the corporate world. In fact, GE and many of its operating divisions rely on RIF policies that incorporate these precise elements. *See infra* at 2 n.2. As respondents' industrial psychology expert with "substantial corporate downsizing experience" testified at trial, these criteria are "ubiquitous components of systems for making personnel decisions." *Meacham II*, 461 F.3d at 144 (Pet. App. 16a) (quotations omitted).

B. Accepting Petitioners' Reallocation of the Burden of Proof Would Create Undue Pressure on Employers to Abandon Commonplace Policies that Are Based on Sound Business Factors.

To maintain a competitive advantage in today's dynamic global marketplace, employers must be able to rely on managerial assessments of employees and to incorporate factors such as employee flexibility in making employment decisions. *See Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (recognizing that sound business administration demands that an employer "must have wide discretion and control over the management of its personnel and internal affairs"). This is true for large and small companies alike. Given the vertical dimensions of many larger companies, employers need to be able to delegate human resource decisions to managers and rely on the discretionary judgments of front-line supervisors. For owners of many smaller businesses, it is not a realistic option to design and implement demonstrably objective policies and then defend the reasonableness of those policies in court. Regardless of the size of the business, employers should not be discouraged from relying on the judg-

ments of managers in making employment decisions. As this Court has long recognized, the demands of a competitive marketplace require that employers have the freedom to exercise such discretion. *See, e.g.*, *Burdine*, 450 U.S. at 259.

Accepting petitioners' reallocation of the burden of proof on the issue of reasonableness poses a serious risk to the continued ability of employers to exercise that freedom. Petitioners nevertheless contend that "there is no reason to think that placing the burden of meeting the modest requirements of the RFOA defense on the employer would lead to any unintended impairment of employer interests." Pet. Br. 36. Petitioners' argument is mistaken. Petitioners underestimate the effect that a newly-imposed obligation to prove the reasonableness of personnel decisions will have on employers. If this Court were to abandon *Wards Cove*'s conclusion that plaintiffs should bear the ultimate burden of persuasion, employers would face a significant disincentive to continued use of the legitimate, commonplace, and sound policies relied on by KAPL here. Forcing employers to prove the reasonableness of all manner of employment decisions would place on employers undue and unwise pressure to adopt more generalized employment policies that are less discretionary and more easily defensible in court but are less tailored to evaluate the true contribution of each employee and the needs of the business (*e.g.*, layoff policies based solely on seniority). Doing so necessarily would decrease the relative importance of sound business administration in designing such policies. Such an outcome would represent a serious and unwarranted setback to the ability of American

employers to compete in today's dynamic global markets.*

Petitioners' suggested reallocation of the burden of proof on the issue of reasonableness means that employers not only must *identify* the legitimate, nondiscriminatory factors on which it based the challenged employment decision, but also must *produce factual support* for the reasonableness of those factors. While it is important that employers set standards for managers involved in making employment-related decisions, and properly monitor the implementation of these standards, petitioners' approach would force employers to abandon the widespread practice of relying on and delegating such decisions to the discretion of supervisors and managers.

The present case offers a perfect example of how petitioners' reallocation of burdens would work a hardship on employers. Petitioners here contend that KAPL's practice of conferring discretionary authority on managers and supervisors was a proxy or vehicle for age discrimination, and thus the reliance on such discretion in completing the RIF matrix was unreasonable. Pet. Br. 7-8. Beyond the statistical evidence on which petitioners relied to

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* Under the allocation of burdens urged by petitioners, tremendous judicial resources would be diverted to resolving whether defendants had demonstrated the reasonableness of any employment decision that happened to correlate with age. Indeed, "every time a company tried to reduce its labor costs the federal courts would be dragged in and asked to redesign the reduction . . . ." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). The very purpose of the RFOA provision is to *prevent* courts from being dragged into such disputes.

make their prima facie case, however, petitioners offered no further evidence to rebut the reasonableness of KAPL's chosen RIF matrix. *Meacham II*, 461 F.3d at 145 (Pet. App. 18a) ("Plaintiffs, who bear the burden of demonstrating that KAPL's action was unreasonable, did not directly challenge the testimony of KAPL principals regarding the planning and execution of the IRIF."). Petitioners did not challenge the reasonableness of assessing the criticality and flexibility of an employee's skills in determining whether it would make sound business sense to retain that employee. Nor did petitioners establish that it was objectively unreasonable to delegate responsibility for assessing employees to front-line managers and supervisors who are in the best position to evaluate each employee and the anticipated needs of a given project or division.

Nevertheless, under the allocation of burdens urged by petitioners, it would fall to KAPL to prove that each of these decisions was reasonable, even though petitioners have never suggested any reason why the factors or methodology employed by KAPL were improper. KAPL thus would face liability based on little more than petitioners' prima facie statistical showing that KAPL's RIF policies resulted in terminations that correlated with age. Such a result would be contrary to the decisions of this Court and would work a substantial hardship on employers.

Petitioners' approach would encourage employers to abandon employment-related policies that incorporate elements such as flexibility and criticality or rely on manager's evaluations. When it comes to potential civil actions based on discriminatory employment decisions, most employers are risk averse, and justifiably so. *See Furnco Contr.*, 438 U.S. at 577

("We know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."). Although employers' desire to avoid not only liability but also litigation doubtlessly has contributed to the elimination or reduction of many forms of workplace discrimination, that very desire to avoid potential lawsuits may overwhelm the legitimate business rationale behind policies similar to those at issue here.

If businesses are required to explain, demonstrate, and *prove* the reasonableness of the myriad of employment decisions that potentially correlate with age, employers will be saddled with a tremendous burden, given the multitude of employment decisions that involve managerial discretion and subjective employment criteria. Employers thus could face trial and liability exposure for doing little more than exercising discretion in running their business.

This inevitably would provide a strong impetus for employers to eliminate the exercise of discretion or use of criteria that involve any subjective analysis from their hiring, promotion, and RIF practices, for fear of ADEA disparate-impact claims. As the Court recognized in *Watson*, "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures." 487 U.S. at 992.

To insulate the company from potential discrimination claims, an employer may feel pressure to rely on more demonstrably objective criteria in designing personnel policies, and choose to adopt a retention policy based on seniority, or on some quantitative measure of production, such as units manufactured, or hours worked, or number of customers served, or

dollar transaction handled. Each of these alternatives is fraught with problems.

As the current case illustrates, seniority-based policies may run afoul of applicable state statutes. *See Meacham I*, 381 F.3d at 71 (Pet. App. 53a-54a). And reliance on one or another potential productivity gauge ignores other critical employment factors, such as quality of work, employee versatility, contributions to the work of others, significance of one line of business as opposed to another, and the like. By pushing employers in the direction of basing employment decisions on objective criteria and away from discretionary judgments, petitioners' proposed allocation of the burden of proof will hinder employers' efforts to make personnel decisions that are tailored to their unique business needs. As the Court cautioned in the context of Title VII, placing the burden of persuasion on employers risks creating "a Hobson's choice for employers" that leads to "perverse results." *Watson*, 487 U.S. at 993. Ultimately, such policies will force employers to lay off employees who should be retained, or promote employees who should not have been promoted.

Given its conclusion that Congress did not intend Title VII to have "any chilling effect on legitimate business practices," the Court in *Watson* went to great lengths to explain how "the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized." *Id.* Adopting the allocation of burdens urged by petitioners is contrary to that conclusion as it will hamstring employers from making employment decisions based on business needs, thus effectively stripping employers of necessary decisional autonomy. Instead, companies will

increasingly turn to objective criteria to avoid potential discrimination claims. Although such practices may be more defensible in court, they are unlikely are to be justified from a business perspective, and can be expected to result in employment decisions that do not serve the need for a skilled, adaptable workforce.

In addition, placing the burden of proving the reasonableness of employment decisions on the employer would invite a finder of fact to second-guess the employer's legitimate business decisions, which properly fall within the realm of management prerogative. Under the allocation of burdens urged by petitioners, the decisive question in disparate-impact claims arising under the ADEA would be whether the defendant can prove, within the limits of the administrative and judicial processes, that the challenged practice was "reasonable"—a question that would lead inevitably to unwarranted second-guessing of employers' personnel decisions. As the Court has recognized, courts are ill-suited to make such judgments. *See Watson*, 487 U.S. at 999; *Rush v. United Technologies*, 930 F.2d 453, 458 (6th Cir. 1991) ("It is not appropriate for us to second guess the business judgment of employers in personnel matters.").

Only by maintaining the allocation of burdens set forth in *Wards Cove* will employers have the necessary room to make employment decisions based on business needs, rather than merely to avoid potential lawsuits. Under the *Wards Cove* allocation of burdens, employers would be able to continue to delegate many employment decisions to the discretion of managers and to continue to rely on the criticality and flexibility factors challenged here. Plaintiffs

would continue to bear the burden of showing that delegating the assessment of these factors was unreasonable. This approach would preserve not only the interests protected by the ADEA, but also the legitimate business interests of employers. Once employers have identified a proper business purpose for their decisions, plaintiffs can appropriately be asked to provide more probative evidence than the bare minimum needed to establish a prima facie case of disparate impact. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 265-66 (1989).

C. Petitioners' Approach Is Inconsistent with the Intent of the ADEA to Preserve Employer Discretion.

Adopting the approach urged by petitioners, to the extent that it inevitably constrains the discretion of employers, is inconsistent with the intent of the ADEA. When Congress enacted the ADEA, it plainly intended to preserve employer discretion so long as the employers' decisions were based on legitimate, non-discriminatory grounds.[9] As courts consistently have recognized, the ADEA was not intended to supersede traditional management prerogatives or to provide a vehicle for courts to second-guess a

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[9] The legislative history of Title VII similarly shows that Congress intended to preserve employer discretion in employment decisions. *See United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979) ("Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.'" (quoting H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2516)).

company's business decisions. *See, e.g., Jorgensen v. Modern Woodmen of America*, 761 F.2d 502, 505 (8th Cir. 1985) ("The ADEA is not intended to be used as a means of reviewing the propriety of a business decision."); *Parcinski v. The Outlet Company*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) (The ADEA "does not authorize the courts to judge the wisdom of a corporation's business decisions."); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (The ADEA "was not intended as a vehicle for judicial review of business decisions.").

The text of the ADEA reflects [illegible] intent to preserve employer discretion. The R[illegible]OA provision, for example, makes clear that "the employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Hazen Paper*, 507 U.S. at 611. At the same time, however, the RFOA provision also "insure[s] that employers [are] permitted to use neutral criteria not directly dependant [sic] on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983). Other provisions in Section 4(f) also protect an employer's right "to discharge or otherwise discipline an individual for good cause" and "to observe the terms of a bona fide seniority system." 29 U.S.C. §§ 623(f)(3); 623(f)(2). Taken together, these provisions make clear that "the statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995). The statutory scheme therefore is inconsistent with petitioners' argument that the burden of proof should lie with employers, a burden that predictably would push employers toward aban-

doning personnel policies that rely appropriately on managerial discretion and other legitimate business-related criteria.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM, *ET AL.*,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National School Boards Association ("NSBA") is a not-for-profit federation of state school board associations from throughout the United States, the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. NSBA and the members of its federation together currently represent the over 95,000 school-board members who govern some 14,000 local school districts employing almost 6.4 million people.[1]

NSBA's mission is to foster excellence and equity in public education through school-board leadership. As part of its mission, NSBA supports the reasonable application of anti-discrimination laws that balance the rights of public school employees with the educational and fiscal challenges facing public schools.

In this case, NSBA seeks to provide the Court with concrete examples of employment decisions faced by public school districts in which a rule that placed the burden on employers to prove a reasonable factor other than age ("RFOA") in a suit brought under the Age Discrimination in Employment Act, 29 U.S.C. § 623 ("ADEA"), would hamper school districts' ability to accomplish their educational mission. School districts employ a variety of sensible employment criteria that are designed to improve educational achievement. When such a RFOA may have a disproportionate impact on workers over 40 years of

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[1] Pursuant to Supreme Court Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

age, school districts should not be required to create a record that they have eliminated every possibility of age discrimination.

SUMMARY OF ARGUMENT

The Second Circuit correctly concluded that the "business necessity" test is irrelevant to ADEA analysis, and that the ADEA does not place on employers the burden of demonstrating that common and necessary employment criteria are reasonable. For our nation's public school districts it is particularly important that employers not bear these burdens. To shift the burden to school districts would undermine a variety of employment practices critical to the success of America's schools.

Public education today embraces challenges that require schools to hire, reward, retain and effectively deploy the teachers and administrators with the skills needed to best promote learning. Schools today must prepare students to compete in a global marketplace. Moreover, they serve an increasingly diverse student population, including many students from low-income or immigrant households and many who may not speak English as their first language. Schools must also serve the wide variety of special needs presented by children with disabilities pursuant to the Individuals with Disabilities Education Act. Finally, schools must educate all children to a higher level in an environment characterized by rapid technological change.

The employment practices necessary to meet these challenges sometimes may disproportionately affect older employees. Some such clearly appropriate employment criteria focus on particular skills and training and thus may favor more recent education-school graduates. For example, the skills necessary to educate students who do not speak English as their first language are more apt to be provided in

teacher training programs today than was true in the past. Other policies that seek to place the best teachers in the schools where they are most needed may disproportionately affect older employees because of the expertise that they have gained through experience. School districts today that are undertaking reorganizations to improve academic achievement at a particular school, or district-wide; are experimenting with incentive pay programs to attract and retain the best personnel where they are most needed; or are required by shrinking budgets to employ a reduction-in-force, all require flexibility in being able to adopt reasonable employment practices to attract and retain the best educators.

Placing the burden of proof in disparate impact cases under the ADEA on school districts to prove that every employment criteria they use is reasonable would impose significant additional costs on school districts and deter necessary, appropriate and sometimes legally mandated reforms and innovations. For these reasons, NSBA urges the Court to affirm the decision below.

ARGUMENT

I. AMERICAN PUBLIC SCHOOLS FACE UNPRECEDENTED CHALLENGES IN REACHING IMPORTANT EDUCATIONAL GOALS.

Our nation's public schools aspire to prepare American citizens for success in an increasingly competitive global marketplace. Such preparation today requires elementary and secondary schools to equip students with skills to succeed in college or other post-secondary education. To meet the challenges of the 21st Century, our public schools are raising the bar for all students. At the same time, public school systems also face unprecedented challenges ranging from the diverse educational and

linguistic needs of their students to the rapidly evolving nature of the skills that students must master. Public schools today are intensely focused on providing students from all backgrounds with an education that will prepare them to compete in a global market. In addition, our schools ensure that children with special needs receive a free appropriate public education through individualized education programs. In this environment, the success of American public schools depends in significant part on the ability to efficiently implement reasonable employment policies and practices.

School districts' efforts to raise the bar for all students have been given additional urgency by requirements of federal law. In particular, the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* ("NCLB"), not only requires annual testing of all students with the goal of 100 percent proficiency by 2014, but it also imposes sanctions for certain schools and school districts, including a variety of employment-related measures that require, for example, replacing staff in such schools. In addition, NCLB requires public school teachers to be or become "highly qualified" and requires that qualified and experienced teachers be fairly distributed within each school district. And the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, requires individualized educational programs for disabled students that can require school districts to employ teachers and staff with a wide range of specialized training.

Part of the impetus for NCLB was the widespread belief that public schools today must do more than ever before. The United States government, American businesses, and our public school districts themselves all recognize that the marketplace and workplace are now global, and the ability to compete internationally requires that students be prepared to

succeed in college. *See, e.g.*, NCMST, *Before It's Too Late: A Report to the Nation from The National Commission on Mathematics and Science Teaching for the 21st Century* 11–13 (Sept. 2000), *available at* http://www.ed.gov/inits/Math/glenn/report.pdf. The challenge is substantial, especially in preparing all students to succeed at the level required in mathematics and science.[2]

Even as the goals of public education are raised, a number of unprecedented challenges also are arising. First, public schools face a rapidly changing student population. The number of minority and immigrant students grows annually. An increasing percentage of American students are not native English speakers. Therefore, teachers must have specialized knowledge and training to teach increasing numbers of students who are English language learners ("ELLs"). Many public schools also serve a growing number of children from low-income families, and some of these students have particular educational needs associated with poverty.

Furthermore, even as standards are raised and educational needs increase, the areas that a sound public education must address continue to expand. As a number of schools and school districts have already recognized, technology has become increasingly important in the workplace, and as such it is vital that schools incorporate computer-based and computer-related learning into their curriculum.

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[2] In a 2006 study that compared 57 countries, 15-year-old students in the United States performed below international averages in science and mathematics literacy. Institute of Educ. Sciences, U.S. Dep't of Educ., *Highlights from PISA 2006: Performance of U.S. 15-Year-Old Students in Science and Mathematics Literacy in an International Context* iii–iv (December 2007), *available at* http://nces.ed.gov/pubs2008/2008016.pdf.

American schools and school districts, therefore, must retain the ability to hire and retain teachers and administrators who have the complex mix of skills necessary to cope with this unprecedented combination of challenges. They should not be hamstrung by a requirement that they be prepared to defend the business necessity or reasonableness of routine employment decisions that for a variety of reasons might have a disparate impact on older workers.

II. THE SUCCESS OF OUR NATION'S PUBLIC SCHOOLS DEPENDS ON FLEXIBLE POLICIES AND PRACTICES FOR HIRING AND RETAINING SUPERIOR TEACHERS, ADMINISTRATORS, AND STAFF, AND SOME OF THESE, WHILE CLEARLY NECESSARY, REASONABLE, AND UNEXCEPTIONABLE, MAY DISPROPORTIONATELY IMPACT OLDER EMPLOYEES.

Highly effective teachers and administrators are central to adequately prepare students for college and for competition in the global marketplace.[3] Both hiring employees who possess the skills critical to promoting educational success and making sure the most effective teachers and administrators are working in schools where the needs are greatest often require reasonable practices that may disproportionately affect older workers. Such situations

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[3] Research shows that students who are assigned to effective teachers have significantly higher achievement and gains in achievement than those who are assigned to ineffective teachers. *See generally* W.L. Sanders & J.C. Rivers, *Cumulative and Residual Effects of Teachers on Future Student Academic Achievement* (Knoxville: Univ. of Tenn. Value-Added Research and Assessment Center 1996), *available at* http://www.heartland.org/pdf/21803a.pdf.

include reorganizations, either educationally driven or legally mandated; teacher reassignments; incentive pay systems designed to reward the most effective teachers; early retirement programs; and reductions in force.

A. Policies Requiring the Training and Skills Required of Highly Effective Teachers and Administrators Today Are Likely to Have Incidental Adverse Effects on Older Employees.

For several reasons, some policies designed to target the teachers and administrators best suited to meet current educational challenges may disproportionately affect older workers.

1. Relatively recent graduates of education schools may be more likely to have adequate training to teach the growing numbers of public school students with special needs. Education programs that teach the specific skills and techniques unique to the needs of low-income, ELL, and mobile students best prepare teachers to help those growing groups of students.[4]

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[4] *See* SEF, *A New Majority: Low Income Students in the South's Public Schools*, 8–9 (2007), *available at* http://www.sefatl.org/pdf/A%20New%20Majority%20ReportFinal.pdf (noting recent dramatic rise in poor students in the South and other regions of the United States); NCES, *English Language Learner Students in U.S. Public Schools: 1994 and 2000* (Aug. 2004), *available at* http://nces.ed.gov/pubs2004/2004035.pdf (documenting recent rise in the number of ELL students in public schools since the 1990s); Russell W. Rumberger & Katherine A. Larson, *Student Mobility and the Increased Risk of High School Dropout*, 107 Am. J. Educ. 1, 1–2 (Nov. 1998) (describing recent increase in student mobility).

For example, today school districts need to hire more teachers trained to deal with the rapid increases in the number of ELL students in American classrooms. Currently, although 41 percent of teachers in the United States have had ELL students in their classrooms, only 13 percent of those teachers reported receiving any instruction or professional development on the education of ELLs. Sandy Watson *et al.*, *English Language Learner Representation in Teacher Education Textbooks: A Null Curriculum?*, 126 Educ. 148, 148 (Fall 2005). For teachers to be prepared to teach ELL students, they must receive systematic training on practical issues concerning ELLs. *See id.* at 148–49. While experienced teachers have opportunities to undergo such training, many elect not to do so.

Second, recent graduates may be more likely to have the necessary skills to teach technology and to teach with technology. It is vital that schools incorporate computer-based and computer-related learning into their curriculum. *See* California Dep't of Educ., *Connect, Compute, and Compete: The Report of the California Education Technology Task Force* 12 (1996). As a result, several states have begun to require school districts to introduce standards that measure and ensure certain technological proficiencies for teachers. *See, e.g.*, South Carolina Dep't of Educ., *Teacher Technology Proficiency (Proviso '.25)*, http://ed.sc.gov/agency/offices/tech/teachprofprov/index.html; Coronado Unified School District, *Staff Development Training: Teacher Proficiency Using Technology*, http://www.coronado.k12.ca.us/technology/teacherprof.htm.

Third, finding the best school administrators to meet contemporary educational challenges may also require reasonable and objective job criteria that could disproportionately affect older workers. School principals, for example, play an important role in

teaching and learning. *See* NGA Center for Best Practices, *Improving Teaching and Learning by Improving School Leadership* 1 (Sept. 12, 2003), http://www.nga.org/cda/files/091203LEADERSHIP.pdf ("*Improving Teaching and Learning*"). Superintendents are increasingly aware, however, that many principals today are not adequately trained to handle the "changing nature of the principalship." *Id.*; *see also* IEL, *Leadership for Student Learning: Reinventing the Principalship* 2 (October 2000), *available at* http://www.iel.org/programs/21st/reports/princpal.pdf. Specifically, school principals, who were traditionally expected to perform primarily managerial and political roles, are now being called upon to serve as entrepreneurs, organizers, and instructional leaders, as well. *Improving Teaching and Learning* at 2.

2. NCLB required school districts, by the 2005–06 school year, to have "highly qualified teachers," as defined by the Act, teaching all core academic subjects in each public elementary school and secondary school. 20 U.S.C. § 6319(a)(2)(A). NCLB itself set out certain criteria by which states were to define "highly qualified" teachers. Although there are slightly different requirements for new and experienced teachers, in general NCLB requires a teacher's qualifications to be assessed under three essential criteria: whether a teacher has obtained a bachelor's degree or better in the subject taught; whether the teacher has obtained full state teacher certification; and whether the teacher has otherwise demonstrated knowledge in the subjects taught. 20 U.S.C. § 7801(23).

Under NCLB, most new teachers coming out of teacher education programs should be deemed "highly qualified." NCLB allows states to adopt higher standards or more demanding teacher qualifications than the federal ones, but states may not

adopt standards below those established in NCLB. 20 U.S.C. § 6319(a)(2). Some states have benefited from this flexibility. Recent research has shown that, to be effective, teachers must understand the information they are expected to teach (which NCLB emphasizes) and must also be comfortable with a range of pedagogical techniques for conveying that information to students. Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequalities in California's Public Schools*, 43 Santa Clara L. Rev. 1045, 1054 (2003). Additionally, teachers must be able to adapt to the changing needs of public school populations, including developing populations of immigrant, special needs and ELL students. *Id.* at 1059. States like California, Nevada, and Illinois have adopted teacher-qualification standards that incorporate these critical skills. *See, e.g.*, Cal. Educ. Code § 44259; Ill. Admin. Code tit. 25 § 25.25; Nev. Admin. Code § 391 *et seq.*

While school administrators have always sought to ensure that the teachers in their district had the necessary skills to meet students' needs, these new NCLB standards for highly-qualified teachers give the task a particular urgency. Since 2001, school administrators have had to take a hard look at their workforces to determine whether those teachers already in the classroom satisfy the new requirements. Inevitably, some teachers do not have the necessary background or experience to meet the NCLB-based standards. When that occurs, administrators face two options. They can either replace the current teacher with another teacher, who may well be newly-credentialed and thus already-trained, or they can provide additional training to the current teacher. The choice may turn on the dual pressures of time and budget.

Time pressure comes in two main forms. First, students' needs are immediate and cannot go unmet

while teachers are being brought up to speed with training. According to the National Center for Educational Statistics at the Department of Education, at the 2000 census, the average school year, nationwide, was only 180 days, and the average school day lasted less than seven hours. *Average Length of School Year and Average Length of School Day, by Selected Characteristics: United States, 2001–02*, http://nces.ed.gov/surveys/pss/tables/table_15.asp (last visited Mar. 20, 2008). For the average American student, high school has only 720 days of instruction. Second, out of the 180 days in a given school year, typically only three to five days will be allocated for teacher training.[5] School administrators recognize that there are limits to the training that can be provided in such a restricted timeframe.

While additional training can be completed, it often can only be completed at the expense of already-

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[5] In 33 states, public school districts and their employees establish the contours of the employment relationship through collective bargaining agreements. *See* Educ. Comm'n of the States, *State Collective Bargaining Policies for Teachers*, StateNotes (Jun. 2002), http://www.ecs.org/clearinhouse/37/48/3748.pdf. Teachers in Montgomery County, Maryland have only three scheduled training days per school year; in Chicago, Illinois the collective bargaining agreement in place when NCLB was enacted provided for five days of training; Baltimore, Maryland requires teachers to attend 10 days of training annually, but this includes both summer training and training that occurs during the school year. *See* Agreement Between Montgomery County Educ. Assoc. & Bd. of Educ. of Montgomery County 35 (2005–2007); Agreement Between the Bd. of Educ. of City of Chi. & Chi. Tchrs. Union 150–51 (1999–2003); Agreement Between the Balt. Tchrs. Union & Balt. City Bd. of Sch. Comm'rs 29 (2005–2007) (all *available at* U.S. Dep't of Labor, Collective Bargaining Agreements, http://www.dol.gov/esa/regs/compliance/olms/cba/Cbau_aabz.htm).

limited classroom time or at an additional financial cost to the district. School administrators, however, hesitate to cut into instructional time, and, depending on a school district's budget, it may not be financially feasible to provide unqualified teachers with additional training. Increased training would require increased funding at a time when school districts are already planning to cut back in all areas of spending because of the economic slump. Nancy Zuckerbrod, *School Officials Expecting Cuts Due to Downturn in Economy*, San Diego Union Trib., Feb. 11, 2008.

3. At the same time, school districts increasingly recognize the importance of having a fair distribution of experienced teachers in all schools. Moreover, NCLB expressly requires that low-income and minority students not be taught by disproportionately under-qualified or inexperienced faculties. *See* 20 U.S.C. § 6311(b)(8)(c). Despite this mandate, schools nationwide with high proportions of low-income or minority students, *are* disproportionately taught by teachers with fewer than three years of experience.[6] Not only are students adversely affected by this pattern, but often other teachers may be as well: Experienced teachers are important in providing mentoring and leadership to less experienced teachers in a school. Charlotte Danielson, *Mentoring Beginning Teachers: The Case for Mentoring*, 6 Teaching and Change 251 (1999).

Traditional school employment practices reward seniority, by among other things, providing greater rights for experienced teachers to transfer within a

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[6] Heather G. Peske and Kati Haycock, *Teaching Inequality: How Poor and Minority Students Are Shortchanged on Teacher Quality, Education Trust* (June 2006), *available at* http://www2.edtrust.org/NR/rdonlyres/010DBD9F-CED8-4D2B-9E0D-91B446746ED3/0/TQReportJune2006.pdf.

school district to the school of their choice.[7] Experienced teachers, however, tend to transfer away from schools with higher proportions of low-achieving students. Eric A. Hanushek *et al.*, *Why Public Schools Lose Teachers*, 39 J. Hum. Res. 326, 337 (2004). While districts are starting to implement incentive pay programs that sometimes seek to keep experienced teachers in schools with low-achieving students, *see infra*, some districts have found that such programs are not sufficient, in and of themselves, to maintain an experienced teaching staff at their most challenged schools. Eric A. Hanushek & Steven G. Rivkin, *Pay, Working Conditions, and Teacher Quality*, 17 The Future of Children 69, 75–76 (2007) (finding that more experienced teachers often transfer to schools with lower salaries but better working conditions).[8] In these kinds of circumstances, a district may reasonably adopt a policy requiring some experienced teachers to transfer to a needier school. Such a policy would be reasonably based on improving student achievement—and would also be likely to disproportionately affect older employees.

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[7] Jessica Levin, Jennifer Mulhern, and Joan Schunck, *Unintended Consequences: The Case for Reforming the Staffing Rules in Urban Teachers Union Contracts*, The New Teacher Project 8–9 (2005) *available at* http://www.ocs.org/html/offsite.asp?document=http%3A%2F%2Fwww%2Etntp%2Eorg%2Fnewreport%2FTNTP%2520Unintended%2520Consequences%2Epdf.

[8] *See also*, Hanushek *et al.*, *Why Public Schools Lose Teachers*, 39 J. Hum. Res. at 351 (finding that a substantial salary premium is required to overcome the effects on teacher turnover of high concentrations of low-achieving, minority, and low-income students in large urban schools: for less experienced females, the salary differential is 25–40 percent).

B. School Districts Undergoing Reorganizations Require Flexibility to Adopt Policies that May Disproportionately Affect Older Employees.

School districts across the country are commonly reorganizing to meet today's educational challenges. A district's ability to implement reasonable methods of reorganization requires sufficient flexibility in hiring and retention policies for administrators and teachers. Such flexibility allows districts to pursue their educational goals, while also ensuring compliance with the accountability standards embedded in state and federal law, including NCLB. In these situations, school districts should not be forced to make personnel decisions that are driven by a fear of litigation under the ADEA.

1. The need for flexibility in personnel policies is particularly acute when a new superintendent enters a school district. In 2007, mean tenure for superintendents was 5.5 years. *See* Amy Vogt, *AASA Releases Study of the American School Superintendency* (Sept. 24, 2007), http://www.aasa.org/newsroom/pressdetail.cfm?ItemNumber=9401, (citing Thomas E. Glass and Louis A. Franceschini, Amer. Assoc. of Sch. Administrators, *The State of American School Superintendency: A Mid-Decade Study* (Rowman & Littlefield Education 2007)). School boards often choose to replace a superintendent in hopes of stimulating academic improvement. Typically, new superintendents develop and implement their own plans for improvement, which can (and often do) include restructuring the entire administration of a school district. In the course of this restructuring, an entire level of management in the school district may even be removed—a type of change that may be expected to disproportionately affect older workers.

An example of this type of reorganization can be

seen in the public schools of New York City, where Mayor Michael Bloomberg assumed control of the public schools in 2003, and launched an initiative known as Children First. As part of the initiative, Mayor Bloomberg hired a new Chancellor, reorganized the city's 32 community school districts into 10 instructional divisions and replaced 40 district superintendents with 10 regional superintendents. *See* David M. Herszenhorn, *Education Dept. Hires 108 Local Supervisors*, N.Y. Times, Apr. 29, 2003; Abby Goodnough, *Vision for the Schools: Overview; Mayor Sets Plan for Tight Control Over City Schools*, N.Y. Times, Jan. 16, 2003. Other examples of recent reorganizations include the District of Columbia and Charlotte, North Carolina. In the District of Columbia, Mayor Adrian Fenty appointed Michelle Rhee as the Chancellor in 2007, and in January of 2008, the D.C. Council granted Ms. Rhee more power to fire underperforming employees. *See* Gary Emerling, *Rhee Fires 98 School Administrative Workers*, Wash. Times, Mar. 8, 2008. In Charlotte-Mecklenburg, a new superintendent reorganized the district in 2007, moving many district administrators from a single central office to new regional offices closer to the individual schools. *See* Steve Lyttle, *Effort to Improve Student Academics*, Char. Observer, May 13, 2007. While all of these reorganizations have been designed to improve student achievement, the steps necessary to achieve them may adversely affect older employees.

2. Even absent a full scale, district-wide reorganization, school administrators seeking to address below-satisfactory student performance need the flexibility to make reasonable personnel decisions and to hire and retain the best teachers without assuming the burden of proof in a lawsuit. Districts may require experienced teachers to act as mentors for new teachers, or as discussed above, may seek to transfer experienced teachers to a particular school

or class with low-achieving students. School districts pursuing such policies to improve student achievement should not be stifled by having to make a record that will support their necessary and reasonable decisionmaking if the district later faces a discrimination claim that older teachers were disproportionately impacted.

In fact, federal law underscores the need for flexibility in hiring and retention decisions related to school-level reorganizations. NCLB, for example, requires school districts to restructure schools that fail to meet their accountability goals for several years. *See* 20 U.S.C. § 6316(b)(7)(C), (b)(8)(B) (calling for the replacement of "the school staff who are relevant to the failure to make adequate yearly progress" after two years of failure, and any other "major restructuring of the school's governance arrangement" after three years). Restructuring in compliance with NCLB often requires the termination of all teachers within a particular school and a requirement that they reapply for their jobs.

In turn, when school districts consider these teachers upon reapplication, they should—in order to improve on the NCLB accountability goals—hire back only the most effective teachers. Districts consider factors such as training and education, motivation, energy, and experience. There is at least the possibility that many of the applicants most qualified under these considerations would be under the age of 40. In such a case, older workers may be adversely affected, but the school districts' decisions would indeed be reasonably based on teacher qualifications.

An example of such a reorganization took place within the Chattanooga, Tennessee school district. *See* NCTAF, *Reducing the Achievement Gap Through District/Union Collaboration: The Tale of Two School Districts*, National Comm'n on Teaching

and America's Future 11–21. In 1996, in an effort to improve a failing school system highlighted by some of the lowest achieving schools in the state, the Chattanooga school district merged with the school district in the surrounding county (Hamilton County). *See id.* at 11. A new superintendent was hired in 1997 to oversee the merger, and he faced countless organizational issues, one of which was hiring and retention of effective teachers. *See id.* at 11–12.

In 2000, the teachers' union and the newly merged district agreed on a plan to reconstitute the faculties at many of the district's lowest achieving schools. *See id.* at 14. Rather than firing teachers, the agreement mandated that any teacher who was asked to leave a failing school would be assured a place at another school within the district. There is a strong possibility that a larger proportion of older teachers may have been affected by these transfers, however, especially as the district looked to place the most effective teachers at its lowest performing schools. *See id.*

As a result of the reorganization, the Hamilton County school district's overall achievement has improved markedly. *See id.* at 22–23. Despite this tremendous improvement, a change in the burden on proof on RFOA may make another superintendent think twice about this same decision in the future.[9]

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[9] Unwanted teacher transfers have been the basis of ADEA claims in the past. *See, e.g., Kodl* v. *Bd. of Educ. Sch. Dist. 45, Villa Park*, 490 F.3d 558 (7th Cir. 2007); *Galabya* v. *New York City Bd. of Educ.*, 202 F.3d 636 (2d Cir. 2000); *Sanchez* v. *Denver Pub. Schs.*, 164 F.3d 527 (10th Cir. 1998).

C. Incentive Pay Systems May Be Needed to Recruit and Retain Effective Teachers.

In their attempts to recruit, retain, and develop the best teachers, several states and districts are changing the way teacher compensation is calculated to reward effective teachers and practices. While many new compensation policies offer promising results for students,[10] they may also have a disparate impact on older teachers. *See* Hanushek *et al.*, *Why Public Schools Lose Teachers*, 39 J. Hum. Res. at 343 (finding greatest positive retention effect of salary increases on less-experienced teachers).

Under a traditional pay scale, teachers earn more based on years of teaching experience accumulated and graduate credits earned. There are two principal shortcomings of this system. First, these factors are not accurate predictors of successful teachers. Studies have generally failed to identify a positive link between advanced degrees unconnected to the

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[10] *See* Dan Goldhaber, Center for Amer. Progress, *Teacher Pay Reforms: The Political Implications of Recent Research* (2006), *available at* http://www.americanprogress.org/issues/2006/12/pdf/teacher_pay_report.pdf; Lewis C. Solomon *et al.*, NIET, *The Effectiveness of the Teacher Advancement Program* 2 (Revised Apr. 2007), *available at* http://www.talentedteachers.org/pubterms.taf?file=http://www.talentedteachers.org/pubs/effective_tap07_full.pdf; Matthew G. Springer & Michael J. Podgursky, NCPI, *Teacher Performance Pay: A Review* 35 (2006), *available at* http://www.performanceincentives.org/data/files/news/PapersNews/Podgursky_and_Springer_2006_Revised.pdf; David N. Figlio & Lawrence W. Kenny, *Individual Teacher Incentives and Student Performance* 3 (Nat'l Bureau of Econ. Res., Working Paper No. W12627, 2006), *available at* http://ssrn.com/abstract=938953.

subject matter taught and teacher effectiveness.[11] And while teachers tend to make significant improvements in their first several years of teaching, the benefits of additional years of experience taper off thereafter.[12] Second, the traditional pay scale fails to exploit the market incentives that operate in other professions to provide a premium to people who fill positions in high demand, possess skills in short supply, or perform exceptionally well. *See, e.g.*, U.S. Dep't of Educ., *Teacher Shortage Areas Nationwide Listing 1990–91 through 2007–08* (Mar. 2008), *available at* http://www.ed.gov/about/offices/list/ope/pol/tsa.pdf (finding, in 2007–08, that 43 states and the District of Columbia are experiencing math teacher shortages, 41 states are experiencing science teacher shortages, and 46 states and the District of Columbia are experiencing special-education teacher shortages).

Although teachers' unions have conventionally

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[11] *See* C.T. Clotfelter *et al.*, *Teacher Credentials and Student Achievement in High School: A Cross-Subject Analysis with Student Fixed Effects* 27 (Urban Inst., Working Paper No. 11, 2007); Dan Goldhaber & Emily Anthony, *Can Teacher Quality Be Effectively Assessed? National Board Certification as a Signal of Effective Teaching*, 81 Rev. Econ. & Stat. 134, 12 (2007); Eric A. Hanushek *et al.*, *The Market for Teacher Quality* 19–20 (Nat'l Bureau of Econ. Res., Working Paper No. 11154, Feb. 2005), *available at* http://www.nber.org/papers/w11154.

[12] *See* Clotfelter *et al.*, *Teacher Credentials and Student Achievement in High School: A Cross-Subject Analysis with Student Fixed Effects* at 19; Eric A. Hanushek *et al.*, *The Market for Teacher Quality* 20–21 (Nat'l Bureau of Econ. Res., Working Paper No. 11154, Feb. 2005), *available at* http://www.nber.org/papers/w11154; D.N. Harris & T.R. Sass, *Teacher Training, Teacher Quality and Student Achievement* 19 (Urban Inst., Working Paper No. 3, Mar. 2007).

opposed merit pay, the urgent need to improve student outcomes in the face of increasing challenges has brought unions and districts to the bargaining table with a renewed focus on student achievement.[13] Although plans that rely solely on test scores or subjective evaluations and those that force teachers to compete for bonuses remain controversial and largely unpopular, *see* Terrence Stutz, *Many Texas School Districts Reject Merit Pay for Teachers*, Dallas Morning News, Mar. 10, 2008 (noting teacher opposition to such plans); *Merit Pay's Unintended Lesson*, St. Petersburg Times, Mar. 13, 2008 (same), some unions and school districts are successfully negotiating agreements that reward student gains, meaningful professional development and leadership, and teaching in hard-to-staff positions.

Incentive plans are garnering increasing support—including from unions and the federal government—because of their potential to help schools meet their educational objectives for students. *See, e.g.*, 20 U.S.C. § 6613(c)(12) (NCLB provision allowing funds to be used as bonuses for teachers in high-need academic subjects and high-poverty schools and districts); Dep'ts of Labor, Health and Hum. Svcs., and Educ. and Related Agencies Appropriations Act 2006, Title V, Part D, Pub. L. No. 109-149, 119 Stat.

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[13] Indeed, local affiliates are working with school districts to shape the details of alternative pay systems even while their national leadership remains largely critical. Press Release, UFT, UFT: DOE "Misguided" to Seek to Use Test Scores to Judge Teachers (Jan. 21, 2008), *available at* http://www.uft.org/news/issues/press/testscores_guide_teachers/; NEA, *NEA Handbook* 278, http://www.nea.org/handbook/images/resolutions.pdf, accessed Mar. 20, 2008. The American Federation of Teachers has taken a more moderate position. "Professional Compensation," http://www.aft.org/topics/teacher quality/comp.htm (last visited Mar. 20, 2008).

2833 ($100 million Teacher Incentive Fund assisting states and school districts in developing performance-based teacher compensation systems). Some states have even passed legislation funding and regulating alternative compensation plans. *See* Fla. Stat. § 1012.225; Minn. Stat. § 179A.01 *et seq.*; Tex. Educ. Code Ann. § 21.701 *et seq.* These changes will benefit teachers, but not all to the same extent.

For example, in Denver, the Denver Classroom Teachers Association and the Denver Public Schools agreed to supplement the established lock-step salary schedule with a new system that rewards professional development, National Board Certification,[14] satisfactory evaluations, student growth on standardized tests, and working in hard-to-serve schools or hard-to-staff positions. Voters approved a tax increase to fund the program. New teachers are automatically enrolled, while veteran teachers may choose whether to join. Denver Pub. Schs., *Professional Compensation System for Teachers*, http://denverprocomp.org/stories/storyReader$33 (last visited Mar. 20, 2008). The four-year pilot study in 16 Denver schools found a positive correlation between program participation and student achievement, prompting full-scale implementation. *See* CTAC, *Catalyst for Change: Pay for Performance in Denver, Final Report* (Jan. 2004), *available at* http://www.ctacusa.com/denver-vol3-final.pdf.

Another Colorado school district, Eagle County, has dispensed with the lock-step salary schedule altogether and adopted the Teacher Advancement Program ("TAP") developed by the Milken Family Foun-

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[14] National Board Certification is a voluntary credential awarded to teachers who excel on both an assessment of knowledge of their subject area and a performance-based assessment, which includes a portfolio of student work samples, assignments, videotaped lessons, and analysis of one's teaching.

dation. The program rewards mentoring, knowledge and skills, and student growth on standardized tests. An early study concluded that students of TAP teachers and schools made greater gains on standardized tests than students of teachers and schools without the program. *See* Solomon *et al.*, *The Effectiveness of the Teacher Advancement Program* at 2.

In Minnesota, the state legislature enacted Q Comp in 2005, and last year approved $76 million to fund the program. Q Comp is a voluntary program based on TAP, but individual districts negotiate with local unions to develop the details of their own plans. The programs must include five components: career ladder/advancement options whereby teachers can take on increased responsibilities and mentoring roles, job-embedded professional development, teacher evaluations performed by multiple people and aligned with state objectives, performance pay tied to student achievement, and an alternative salary schedule. As of this academic year, 39 school districts and 21 charter schools had approved plans in place. Minn. Dep't of Ed., *Quality Compensation for Teachers (Q Comp)*, http://education.state.mn.us/MDE/Teacher_Support/QComp/index.html (last visited March 20, 2008).

Because incentive pay systems are relatively new, the effects on different age groups are still uncertain. Although the plans are facially age-neutral, they disrupt—and in some cases replace—a system whereby teachers were rewarded simply for remaining in the classroom, receiving automatic raises as they aged. Bonuses for specified degrees or skills might also result in a skewed distribution of awards. But neither of these effects are the result of age discrimination, and school districts should not be discouraged from experimenting with incentive compensation programs for fear of having to prove

their business necessity or reasonableness in potentially long and expensive litigation.

D. Early Retirement Programs Help School Districts Ensure a Highly-Qualified Teaching Staff

School districts' early retirement programs typically encourage employees who have attained a certain age or a requisite number of years' service to retire earlier than they otherwise might. School districts offer a variety of financial incentives, including lump sum payments to those who retire early, additional yearly stipends on top of any earned retirement benefits, or bridge health benefits to those who retire before they are eligible for Medicare. *See* Diane M. Juffras, *Early Retirement Incentive Programs: Are they Legal for North Carolina Public Employers?*, 33 Pub. Emp. Law Bull. 1 (2006) http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/pelb33.pdf.

School districts have traditionally used early retirement programs to help ease budgetary crises. Under typical early retirement programs, employees with enough seniority to benefit from the programs would generally earn salaries near the apex of the district's pay scale. When those employees take advantage of the early retirement programs and exit the workforce, they release district funds for other uses.

In addition, where teachers fail to meet the highly qualified requirements of NCLB, as discussed previously, school administrators may determine that they will be unable to retrain some teachers, because of time or budgetary constraints. Those teachers may have been with the school district for a significant period of time. In those cases, early retirement programs provide a graceful option for exit by employees who would require extensive and expensive

training in order to bring their skills into line with a district's needs. Early retirement programs thus also create space for school districts to hire newly trained and highly qualified teachers into the district's workforce.

To encourage employees to retire sooner, rather than later, these plans often offer the best benefits to the youngest eligible employees, with benefits decreasing or ceasing over time or upon attainment of some particular age. Because the benefits provided by early retirement programs typically diminish as employees age, school districts' programs have been subject to numerous ADEA lawsuits, both by the EEOC and by private parties. The cases have been brought both as disparate treatment and disparate impact cases. *Compare O'Brien* v. *Bd. of Educ. of Deer Park Union Free Sch. Dist.*, 92 F. Supp. 2d 110 (E.D.N.Y. 2000) (holding that early retirement program's payment plan based on accumulated sick leave, which diminished benefits during plaintiffs' window of eligibility, was disparate treatment under the ADEA) *with EEOC* v. *Hickman Mills Consol. Sch. Dist. No. 1*, 99 F. Supp. 2d 1070 (W.D. Mo. 2000) (holding, under alternate theory of liability, that plan that reduced benefits as years of eligibility passed created disparate impact on older workers and violated ADEA).

In 1998, the EEOC instituted the first of hundreds of ADEA lawsuits nationwide that targeted school districts with early retirement programs. The majority of the lawsuits addressed programs that provided "bridge" medical benefits for early retirees. Under the plans, school districts would provide medical benefits for early retirees until they turned 65 or became eligible for Medicare. The EEOC eventually abandoned its theory that the bridge benefits violated the ADEA. Congress, however, was so troubled by the ADEA lawsuits against the school districts

that, in the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (codified at 29 U.S.C. § 623 *et seq.*), it created an express ADEA exemption for certain school-district sponsored early retirement programs, including those that provided bridge medical benefits, *id.* (codified at 29 U.S.C. § 623(*l*)(1)).

Workforce and ADEA lawsuits over early retirement programs, however, continue to be of concern for school districts nationwide. The EEOC did not abandon all of its ADEA lawsuits against school districts for their early retirement programs, only those based on the bridge-benefits programs. *See* Amy Hetzner, *Cases Against Districts Dropped*, Milwaukee J. Sentinel, Aug. 1, 2001 (noting that EEOC, even after dropping bridge-benefit cases, still had 102 pending early retirement program lawsuits against Wisconsin school districts).[15] School districts are still required to defend ADEA lawsuits brought against them for early retirement plans. The NSBA urges the Court to consider the importance of necessary and reasonable early retirement programs as a method for school districts to ensure that their workforces are staffed by teachers with the necessary skills for success in the classroom.

E. Districts Facing Budgetary Constraints May Require Reductions in Force.

School districts across the country regularly face circumstances that require them to reduce the size of their workforces. These reductions in force (RIFs) overwhelmingly occur when school districts experience difficult financial circumstances.

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[15] Indeed, NSBA's ongoing concern about the viability of school district early retirement programs led it to file an *amicus* brief in *Kentucky Retirement Systems* v. *EEOC*, 126 S. Ct. 36 (2007) (No. 06-1037), also before the Court this Term.

News reports indicate that at least 50 school districts nationwide have conducted RIFs in the last three years alone. The RIFs cut across employment categories, hitting not only teachers, but also classroom support staff, administrators, and physical plant staff. The number of school district employees subject to RIFs varied depending on the district, ranging from as few as five or 10 employees to as many as hundreds. *Compare* Kris Sherman, *Budget OK for Tacoma Schools*, Tacoma News Trib., Apr. 27, 2007 (reporting six teachers laid off in RIF) *with* Marie Leech, *Classrooms Hit Hardest by Employee Cuts*, Birmingham News, May 5, 2007 (reporting 398 employees, in a variety of positions, laid off in RIF).

An increased number of RIFs are a certainty in the coming years. School districts across the country will struggle with the financial repercussions of sharp declines in local housing markets, which will affect the state and local revenues available for educational funding. *See* Zuckerbrod, *School Officials Expecting Cuts Due to Downturn in Economy*, San Diego Union Trib., Feb. 11, 2008. Some effects are already being felt. In California, Governor Schwarzenegger has called for four billion dollars in cuts to the state education budget, leading school districts to send notices of potential layoffs to more than 10,100 teachers statewide. Jill Tucker, *Layoff Notices Set to Hit Teachers' Mailboxes*, S.F. Chron., Mar. 14, 2008.

Fluctuations in enrollment can also lead to RIFs. When enrollment decreases overall, and demand for educational services drops, it is hard for school districts to justify the same number of district employees. Even when overall demand for educational services within a district remains constant, however, shifts in demand within the district can still lead to RIFs. For example, a district may enroll a particularly large number of elementary school students at

a given point in time. Absent drastic changes in a district, those students will move *en masse* through the school system, changing the school system's staffing needs as they go. In the early years, the school district will need more highly-qualified elementary school teachers; in later years the district will need more highly-qualified middle and high school teachers. Under NCLB, those two sets of teachers, and their skills, are not fungible, 20 U.S.C. § 7801(23)(B), and teachers cannot be shifted seamlessly from one level to another. At a certain point, as the particularly large group of students moves into middle and high school, the school district may need to conduct RIFs among elementary school teachers, even while hiring new middle and high school teachers.

2. In districts with traditional collective bargaining agreements in place, RIFs like these fall more heavily on younger workers because traditional collective bargaining agreement seniority rules include a "last hired, first fired" system that favors older workers. However, almost a third of the states nationwide are not union states. Additionally, RIFs often affect both union and non-union positions. When RIFs occur in non-union school districts, or cover non-union positions, they may disproportionately affect older workers. *See, e.g., Mize* v. *Sch. Bd. of Polk County*, 10 F. Supp. 2d 1314 (M.D. Fla. 1998) (vocational school teacher laid off in RIF brought suit under ADEA). In such situations, older displaced employees have sued school districts under the ADEA. The government has also intervened on their behalf. *See EEOC* v. *Dist. of Columbia Pub. Schs.*, 277 F. Supp. 2d 44 (D.D.C. 2003) (EEOC brought suit on behalf of 62-year-old social studies teacher terminated in RIF); *EEOC* v. *Dist. of Columbia Pub. Schs.*, 217 F.R.D. 12 (D.D.C. 2003) (EEOC brought suit on behalf of 67-year-old terminated in RIF). School districts that conduct RIFs are, almost *ipso facto*, facing difficult

budgetary constraints. When those districts have made necessary and reasonable financial decisions about what is best for the district as a whole, they should not have to use limited available funds to meet additional legal burdens in lawsuits from disgruntled employees.

III. CHANGING THE BURDEN OF PROOF FOR EMPLOYERS IN DISPARATE IMPACT CASES WILL MAKE IT MORE DIFFICULT FOR SCHOOL DISTRICTS TO MEET TODAY'S EDUCATIONAL CHALLENGES.

The Second Circuit correctly ruled below that, in ADEA disparate-impact cases, an employer can defeat a plaintiff's prima facie case by adducing evidence suggesting that its employment decisions are based on routinely used age-neutral employment criteria, and that the ultimate burden of persuading the fact finder that the employer's purposes are unreasonable remains with the plaintiff. As the Second Circuit noted, "[i]t would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable." *Meacham* v. *Knolls Atomic Power Laboratory*, 461 F.3d 134, 142 (2d Cir. 2006).

Such a redundant requirement would have particularly serious adverse effects on public school districts. The need to prove the business necessity or reasonableness of all of the various types of common and essential school-district employment practices, examples of which are discussed above, because they might have a disparate impact on older workers would impose significant additional costs on school districts. Given the intense educational challenges embraced by school districts today, they should not also be forced to make personnel decisions based on the potential for a later ADEA lawsuit, rather than on the best interests of their students.

For example, when staff cut backs are required for legitimate non-discriminatory reasons, school district administrators would incur significant inefficiency and delay if they had to weigh each and every alternative to determine which would have the least impact on older employees. The Second Circuit recognized this dilemma when, referring to *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228 (2005), it observed that "[t]o draw a negative inference from the *ex post* age distribution of laid-off employees would inhibit reliance on reasonable and useful employment criteria that are highly correlated with age." *Meacham*, 461 F.3d at 145.

The Second Circuit's rationale is particularly compelling in the context of actions by a school district. The resources of school districts, many of which are relatively small, are far from limitless. While for-profit employers may be able to calculate litigation costs and expenses into yearly budgets, school districts are governmental institutions supported by local tax dollars for which litigation—and especially litigation over reasonable hiring and retention decisions—can be an unexpected, and unbudgeted expense. Any additional costs for public schools necessarily must come out of a school district's taxpayer-funded budget at the expense of educational services for children.

Congress included the RFOA factor in the ADEA because it realized that there are reasonable policies, including those discussed herein, that may affect older employees disproportionately. These policies are not based on stereotypes about age, but rather serve other important interests. Indeed, in the school context, as noted above, some such policies may be based on the skills obtained by teachers through their years of experience and the need for those unique abilities possessed by particular teachers.

In sum, for school districts, even more than other employers, many "employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Meacham*, 461 F.3d at 145 (*quoting City of Jackson*, 544 U.S. at 240–42). School districts have a compelling interest in providing a quality education for students throughout the United States, and that interest, rather than any stereotypes about age, drives the various employment practices discussed above. [16]

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[16] Plaintiffs are well able to bear the judicial burden of challenging the reasonableness of a school district's employment decisions. The relative resources of the parties have nothing to do with the burden of proof—as the Fourth Circuit put it, "[w]e do not automatically assign the burden of proof to the side with the bigger guns." *Wenst* v. *Schaffer* ex rel. *Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff'd* 546 U.S. 49 (2005). For example, parties challenging actions of the federal government bear the ordinary burden of proof despite the resources at the government's disposal. *See* 5 U.S.C. § 556(d). Just because an employer may appear to be more powerful and larger than a single employee, the employer should not automatically be forced to bear the burden of proof for RFOA.

CONCLUSION

For these reasons, NSBA respectfully suggests that the Court affirm the Second Circuit's decision.

Respectfully submitted,

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